Supreme Court, U.S.
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No. 10-649

IN THE

Supreme Court of the United States

APOLLO GROUP, INC., et al.,

Petitioners,

v.

POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In any securities fraud case, a plaintiff must prove "loss causation"—that a misrepresentation that artificially inflated the stock price actually caused the plaintiff's loss. Plaintiffs typically prove loss causation by pointing to a drop in stock price after the true facts are revealed—i.e., after a so-called "corrective disclosure" is made. This case presents two questions that have split the circuits:

1. This Court has held that an efficient market automatically incorporates all publicly available information into stock price. Based upon this presumption, plaintiffs who invoke the efficient market theory do not have to prove that they personally knew of and relied on a misrepresentation. Under this theory, a corrective disclosure that reveals the previously undisclosed material facts should immediately produce a decline in price. Where a plaintiff invokes the efficient market theory to avoid having to prove reliance, is the plaintiff barred from trying to prove loss causation based on a decline in price that happened weeks or months after the corrective disclosure?

2. If the stock price does not decline after the facts are publicly revealed, but does decline after an analyst issues a report that merely synthesizes and comments upon the already-public information, is the plaintiff barred from treating that report as a fraud-revealing corrective disclosure that suffices to prove loss causation?

PARTIES TO THE PROCEEDING

The petitioners, who were the defendants-appellees below, are Apollo Group, Inc., Todd S. Nelson, and Kenda B. Gonzales. The respondent, who was the plaintiff-appellant below, is the Policemen's Annuity and Benefit Fund of Chicago.

CORPORATE DISCLOSURE STATEMENT

Petitioner Apollo Group, Inc. has no parent corporation and no person or publicly traded corporation owns more than 10% of its stock.

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The court of appeals opinion is reprinted in the Appendix to the Petition ("App.") at 1a-3a. The district court's opinion is available at 2008 WL 3072731 and is reprinted at App. 4a-19a.

JURISDICTION

The court of appeals entered its judgment on June 23, 2010. A timely petition for panel rehearing and rehearing *en banc* was denied on August 17, 2010. App. 20a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(4), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, are reproduced at App. 21a-24a.

INTRODUCTION

In every securities fraud case, the plaintiff must prove "loss causation," and virtually every securities fraud case that is a class action involves an application of the efficient market theory. But the circuits are hopelessly split about how a plaintiff can prove loss causation in an efficient market—with the Ninth Circuit adopting the most plaintiff-friendly rules.

The efficient market theory may be the most powerful weapon this Court has ever granted to securities fraud plaintiffs. In the classic fraud case, the plaintiff cannot win simply by proving that a statement was false. The plaintiff must also prove that he heard and relied upon the statement in acting to his detriment. Reliance is an element of securities fraud as well. But in *Basic, Inc. v. Levinson*, this Court held that a plaintiff does not have to prove that he personally heard and relied on the statement when the market is "efficient." 485 U.S. 224, 246-49 (1988).

Large, sophisticated public stock markets are typically presumed to be efficient, which means that the market quickly and fully incorporates all information that is in the public arena into the stock price. So when a publicly traded company makes a material misrepresentation, the plaintiff can invoke the assumption that the market relied on the misrepresentation which in turn artificially inflated the stock's price, and the plaintiff is presumed to have relied on the stock's price as reflecting the stock's fair value. Without this "fraud on the market" assumption, securities fraud class actions would be virtually impossible: Very few shareholders could assert that they heard and relied upon the same misstatement and the proof as to each shareholder would be different.

Loss causation is also a critical element of securities fraud. A plaintiff must prove the "causal connection between the material misrepresentation and the loss," *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005), and may recover only "those

economic losses that misrepresentations actually cause," *id.* at 345. In an efficient market, loss causation typically boils down to a simple proposition: If a misrepresentation artificially inflated a stock's price, then the stock price will decline when the market learns the true facts—when the market hears statements that correct the prior misstatement or omission. *Id.* at 344-45. And the amount of the decline in direct response to such a so-called "corrective disclosure" represents a measure of how much the misrepresentation inflated the stock price. Accordingly, plaintiffs are not permitted to recover losses based on stock price drops that are attributable to anything other than corrective disclosures. *Id.* at 345-46.

In the two decades since this Court adopted the efficient market theory, it has never directly addressed two interrelated questions that have a profound impact on loss causation, both of which have split the circuits.

The first stems from a question this Court explicitly left open in *Basic*: "how quickly and completely publicly available information is reflected in market price." 485 U.S. at 249 n.28. The answer to this question dictates the viability of many securities fraud cases. Plaintiffs' lawyers typically file securities fraud cases when stocks decline in price. To prove loss causation, they attempt to demonstrate that the declines occurred some time after alleged corrective disclosures became public. But what is the permissible time lag between the disclosure and the stock decline, and is it permissible to have one standard for purposes of the fraud on the

market presumption, and a fundamentally different standard for materiality and loss causation?

The circuits are hopelessly split on this question. On one side of the spectrum is the view (adopted in three circuits) that in an efficient market, the stock must decline immediately after the alleged corrective statement. Under this view, if there is any lag in time, then the decline cannot be attributed to the alleged corrective disclosure, either because the market did not regard the information as material or because the alleged fraud did not cause the plaintiff's loss. On the other side of the spectrum is the view—adopted by three other circuits, including the Ninth Circuit—that for purposes of determining loss causation plaintiffs can point to purported corrective disclosures that do not yield price declines for days, weeks, or even months.

The second (and closely related) question is what sorts of statements can qualify as corrective disclosures. In order to bridge the time lag between the corrective disclosure of facts and a decline in stock price, plaintiffs' lawyers will often point to further statements that were made *after* the public learns the facts. They will assert that the market may have learned the *facts*, but it did not appreciate their full ramifications until some authoritative source translated the facts with additional analysis or predictions of their effect. The question is whether such assertions can be reconciled with this Court's holding that the price of securities traded on well-developed markets reflects "all publicly available information." *Basic*, 485 U.S. at 246.

Five circuits have held that the recharacterization or analysis of previously disclosed facts—or opinions or predictions regarding the impact of such facts—*cannot* be a corrective disclosure. The Ninth Circuit stands alone in holding that an analyst's opinions, predictions, and analyses of previously disclosed facts can be a corrective disclosure.

The Ninth Circuit's approach to both questions grants plaintiffs all the benefits of a presumptively efficient market without any of its consequences: It posits a market that is perfectly efficient, speedy, and omniscient for purposes of granting plaintiffs the enormous benefit of the presumption of reliance on misrepresentations, but horribly inefficient, sluggish, and doltish in response to corrective disclosures.

The lower courts need this Court's guidance to determine whether that asymmetrical approach is the law.

STATEMENT OF THE CASE[1]

Factual Background

Petitioner Apollo is a publicly traded corporation that is the parent company of the University of Phoenix ("UOP"), the largest private university in the United States. Plaintiff brought this securities-fraud class action alleging that Apollo made false and misleading statements concerning a Department

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[1] The Excerpts of Record and the Supplemental Excerpts of Record before the court of appeals will be cited as "ER" and "SER," respectively.

of Education ("DOE") program review and a subsequent report (the "DOE report") that was critical of UOP's student-recruiting practices.

UOP participates in the federal financial aid program established under Title IV of the Higher Education Act. To remain eligible to receive Title IV funds, UOP must meet various statutory and regulatory requirements, including a prohibition against providing incentive compensation to its enrollment counselors based solely on the number of students recruited. *See* 20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(b)(22)(ii)(A).

In August 2003, the DOE began a review of UOP's recruiting practices, and by February 5, 2004, the DOE provided its report to Apollo confidentially. The DOE report concluded that UOP violated the restriction on incentive compensation. Apollo strongly disagreed with the DOE's assessment, and believed that it would be able to resolve the issues in a way that would not materially affect the company's finances. Apollo advised the market of the fact that the DOE was reviewing its program, but not of the report itself, in a series of analyst calls between March and August 2004.

During the summer of 2004, Apollo negotiated with the DOE, and ultimately settled with the Department for $9.8 million. There is no dispute that this amount was not material to Apollo's financial results. In a press release and subsequent analyst conference call on September 7, 2004, Apollo disclosed the existence of the DOE report and its settlement with the DOE. These disclosures had no

statistically significant effect on the price of Apollo's stock.

A week later, on September 14 and 15, the contents of the DOE report were widely disseminated through various major newspapers, including the *Wall Street Journal*, the *Chicago Tribune*, the *Dallas Morning News*, and *The Arizona Republic*. These newspapers published highly critical stories about Apollo's recruiting practices that quoted excerpts from the DOE report's inflammatory allegations, and noted problems Apollo and the for-profit education industry would face in light of the report.

For example, on September 14, *The Arizona Republic* ran a front-page story that characterized the DOE report as a "harsh[]" and "critical" evaluation of Apollo's recruiting practices. ER 580, 582. The newspaper reported it had obtained the "45-page report," which described a "corporate culture overly focused on boosting enrollment" and "compensation and sales practices the department says range from illegal to unethical to aggressive." ER 580. The article quoted the report's assertion that UOP "[s]ystematically and intentionally operates in a duplicitous manner so as to violate the department's prohibition against incentive compensation," and emphasized various regulatory risks. ER 580-81. The article warned that the regulatory scrutiny of Apollo imperiled the "60 percent of the school's tuition revenue [that] comes from financial aid." ER 581.

The next day the *Wall Street Journal* published another highly critical article entitled, "Will Apollo's Bad Report Card Get Its Shares Grounded?" ER 671. The *Journal* reported that it had reviewed a "newly disclosed [DOE] report" that "blasts Apollo Group Inc.'s flagship University of Phoenix for a 'culture of duplicity' in which supervisors improperly lavished money on sales employees for signing up scores of new students, including those unable to cut it." *Id.* According to the article, the report "raise[d] the question of whether a too-aggressive approach contributed to Apollo's dazzling growth—and if it now will be forced to tone down its approach and grow more slowly." *Id.*

Similar articles appeared in *The Dallas Morning News* and the *Chicago Tribune*. Each emphasized the regulatory risk that the DOE report foreshadowed for Apollo and its industry. Under the banner, "School Fine May Foretell Crackdown," the *Chicago Tribune* reported that "leading industry executives said Tuesday that investigations may lead to stricter regulatory control of their sector and spark the interest of Congress." ER 598. It quoted a statement from Apollo's CEO that "Congress will get more involved," and an acknowledgment from the CEO of another for-profit university that, "[i]f there turns out to be inappropriate activity, it will stimulate regulators to take a more aggressive role." *Id.*

Despite this extensive negative national news coverage there still was no statistically significant movement in Apollo's stock price.

On September 20, nearly a week after the press coverage (and two weeks after Apollo's first announcement of these events), a securities analyst, Kelly Flynn of UBS, released two reports about Apollo and the for-profit education industry in which she downgraded her outlook for Apollo's stock and lowered UBS's rating on Apollo from "Neutral" to "Reduce." ER 502. Her reports offered opinions, analyses, and predictions about the potential impacts of the DOE report, as well as other negative developments completely unrelated to the DOE report. Flynn's reports did not disclose any of the contents of the DOE report, and the opinions and analyses referred only to facts that had already been publicly announced.

On September 21, the day after Flynn disseminated her analyses, and downgraded Apollo's stock rating, there was a statistically significant drop in Apollo's stock price.

Proceedings in the District Court and Court of Appeals

Plaintiff filed this class action suit in the United States District Court for the District of Arizona alleging violations of Section 10(b). Plaintiff asserted that Apollo committed securities fraud by failing to tell the market about the DOE report itself (as opposed to just the fact that the DOE was conducting a review) during Apollo's analyst calls between March and August 2004, and downplaying the significance of the DOE report when it announced its settlement with the DOE on September 7, 2004.

The case was tried to a jury. Because the lag between the disclosure of the DOE report and the decline in stock price was so long, plaintiff attributed the decline to Flynn's analyst reports. It insisted that the analyst reports were "corrective disclosures," even though they contained no new facts. Because Apollo's disclosure of the DOE settlement on September 7, and the detailed press coverage on September 14 and 15 of the DOE report's allegations and their potential regulatory repercussions, had produced no statistically significant drop in the price of Apollo's stock, plaintiff's case depended entirely upon proving that the Flynn reports—which revealed nothing other than Flynn's analyses and opinions about these events, and the stock rating downgrade—finally revealed the fraud. The district court correctly instructed the jury that the "alleged misrepresentations and omissions in this case could have caused the plaintiff to suffer damages only if you determine that the analyst reports issued by Kelly Flynn on September 20, 2004 were corrective disclosures." SER 118.

The jury returned a verdict in favor of plaintiff. The jury calculated an amount of inflation per share, which would total hundreds of millions of dollars for all shares purchased during the class period. Defendants then moved for judgment as a matter of law, arguing that the Flynn reports were not corrective disclosures as a matter of law because they did not disclose any new facts that corrected any prior statement made by defendants or reveal Apollo's alleged fraud.

The district court agreed and entered judgment as a matter of law in defendants' favor. The court concluded that no reasonable juror could infer loss causation from the stock price decline following the Flynn reports because the reports did not provide any new, fraud-revealing facts or analysis. The court held that "[a] corrective disclosure that does not reveal anything new to the market is, by definition, not corrective." App. 8a. The court determined that the evidence at trial was insufficient to show that the Flynn reports said anything appreciably different from what had been previously reported by Apollo itself and by major American newspapers.

Although predictions (as distinguished from the disclosure of facts) do not constitute corrective disclosures, the district court noted that plaintiff's "claim[] that the Flynn reports were the first to predict future regulatory problems as a result of the previously disclosed contents of the DOE report . . . was demonstrably false." App. 10a. In light of the *Chicago Tribune* article "report[ing] that 'leading industry executives said . . . that investigations may lead to stricter regulatory control of their sector," and Apollo CEO Todd Nelson's own predictions of greater regulatory scrutiny, the court determined that the jury "could not properly conclude that the [Flynn] reports were corrective [disclosures]." App. 11a.

The district court also rejected plaintiff's contention that the Flynn reports were corrective disclosures because they supposedly "revealed for the first time that the UOP was experiencing

increasing turnover among its enrollment counselors as a result of the new compensation plan." *Id.* The court stated that "the uncontradicted evidence at trial was that enrollment counselor turnover actually decreased," and "[a]s a matter of logic, false information cannot possibly be corrective information." *Id.* In addition, because Apollo did not make any representations at all concerning turnover, the district court held that plaintiff "did not present any evidence linking this claim to *Apollo's misrepresentations*." *Id.* (emphasis in original).

Finally, the district court rejected plaintiff's claim that the "Flynn reports were corrective because it was 'obvious from the report[s] that Flynn had 'read the [DOE] report.'" App. 12a. "[W]hat Flynn did or not read before issuing her reports is irrelevant. All that matters is what she actually disclosed to the market in her reports, and [plaintiff] conceded, as it must, that Flynn did not disclose any of the DOE report's contents in her reports, much less any new contents." *Id.*

The Ninth Circuit reversed, holding that "[t]he jury could have reasonably found that the [Flynn] reports following various newspaper articles were 'corrective disclosures' providing *additional or more authoritative* fraud-related information that deflated the stock price." App. 2a (emphasis added).

In so doing, the Ninth Circuit relied on *In re Gilead Sciences Securities Litigation*, 536 F.3d 1049, 1058 (9th Cir. 2008), for the proposition that a later disclosure can be "corrective" for purposes of proving loss causation when the "public"—not the market—

initially "fail[s] to appreciate [the] significance" of earlier fraud-revealing disclosures. App. 2a. The court also relied on *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 503 (9th Cir. 1992), for the proposition that what the market understands depends on the "intensity and credibility" of the fraud-revealing information. App. 2a.

The Ninth Circuit gave no indication how the market could have "failed to appreciate the significance" of the DOE report in light of the comprehensive media coverage of its contents and potential consequences. Nor did the court attempt to explain how or why the newspapers could not have been sufficiently "credible" sources, or how a supposedly efficient market could have been blind to the published facts for one to two weeks, until a securities analyst issued reports that said nothing new.

REASONS FOR GRANTING THE PETITION

There is direct conflict among the circuits regarding how efficiently information is incorporated into price. Under one approach—most clearly espoused by the Ninth Circuit, but also supported in the Fifth and Sixth Circuits—the defendant can be held liable in a presumptively efficient market even where the gap between the alleged corrective disclosure and the subsequent price reaction is days, weeks, or months. Under the other approach—espoused by the Second, Third, and Eleventh Circuits—there can be no liability unless the price declines immediately after a corrective disclosure.

There is also a conflict among the circuits regarding what type of information can constitute a corrective disclosure in an efficient market. In the Ninth Circuit alone, a purported corrective disclosure does not even have to say anything new. An analysis or synthesis of already disclosed facts or an analyst's decision to lower its rating on a company's stock can suffice to establish loss causation. The Second, Third, Fourth, Fifth, and Eleventh Circuits have all rejected this approach.

The issues involved here are of substantial national importance in light of the billions of dollars a year in securities class action settlements and judgments, as well as the high proportion of class actions filed in the Ninth Circuit.

The lack of clear guidance from this Court on these two very important issues has led to inconsistent decisions that offend standards of justice and fairness because the result in any particular case depends so much on where the case was filed. This case presents an excellent vehicle to address these issues because it follows a full trial on the merits and allows the Court to address the substantive standards for proving, and not just pleading, loss causation.

I. THE CIRCUITS ARE SPLIT ON TWO FUNDAMENTAL ISSUES OF LOSS CAUSATION.

A. The Circuits Are Split On Whether A Delayed Reaction Can Provide A Basis For Loss Causation In An Efficient Market.

The circuits are hopelessly split over the time frame in which a corrective disclosure must be incorporated into a stock's price. The approaches break into two diametrically opposed camps.

Immediate price reaction required. In one camp are several circuits that hold that a defendant cannot be held liable based upon a purported corrective disclosure unless the price declined immediately after the announcement of the allegedly undisclosed facts. Some courts in this camp hold that the defendant cannot be held liable in that circumstance because the plaintiff cannot prove loss causation. Others hold that liability cannot be established because the market's failure to react immediately proves that the market did not view the disclosure (and thus the allegedly misrepresented fact) as material.

The Third Circuit is emphatically entrenched in this camp. As then-Judge Alito explained:

> [W]hen a stock is traded in an efficient market, the materiality of disclosed information may be measured post hoc by looking to the movement, in the period *immediately*

> following disclosure, of the price of the firm's stock. Because in an efficient market "the concept of materiality translates into information that alters the price of the firm's stock," if a company's disclosure of information has no effect on stock prices, "it follows that the information disclosed . . . was immaterial as a matter of law."

Oran v. Stafford, 226 F.3d 275, 282 (3d Cir. 2000) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997)) (emphasis added).

The Eleventh Circuit is squarely aligned with the Third Circuit's position, holding that a plaintiff's theory of loss causation was "frivolous" where the stock price did not react following an initial alleged corrective disclosure, but declined 22 days later following a second alleged corrective disclosure. *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 689 (11th Cir. 2010). The court explained that any theory of loss causation must fail when it depends on "measur[ing] loss causation over twenty days after the market had learned of the alleged fraud." *Id.*

The Second Circuit is in accord. It affirmed summary judgment for a defendant whose controversial accounting treatment for certain transactions had been publicly revealed in SEC filings and in news media reports, but whose stock did not decline until a year later when it again became the focus of critical articles in the *Wall Street Journal* and the *Financial Times*. *See In re*

Omnicom Grp., Inc. Sec. Litig., 597 F.3d 501, 503-08 (2d Cir. 2010). With such a long time lag, the Second Circuit did not have occasion to opine about just how quickly the market must react. Even so, the court reasoned that "[h]aving sought to establish investor reliance by the fraud-on-the-market theory, [the plaintiff] faces a difficult task," for it "must concede that the numerous public reports on the . . . transaction were '*promptly digested*' by the market and 'reflected in Omnicom's stock price' in 2001 while seeking to recover for a stock price decline a year later in 2002." 597 F.3d at 511 (emphasis added). Under this reasoning, a time lag of days or weeks would almost certainly be impermissible.

The Second Circuit also adopted the immediacy rule in *Teamsters Local 445 Freight Division Pension Fund v. Bombardier, Inc.*, 546 F.3d 196 (2d Cir. 2008), where it affirmed a district court's denial of class certification. The court held that "[e]vidence that unexpected corporate events or financial releases cause an immediate response in the price of a security has been considered the most important . . . factor" in determining market efficiency and "the essence of an efficient market and the foundation for the fraud on the market theory." *Id.* at 207 (internal quotation marks and brackets omitted). The absence of a prompt price reaction following adverse disclosures was one of the key factors the court identified as supporting a finding that the market was inefficient. *Id.* at 210 ("the empirical data actually supported a finding of market inefficiency because there were no material price drops . . . after [the securities] were downgraded . . . and because transaction prices . . . reacted weakly to unexpected

downgrades") (internal quotation marks and brackets omitted).

Immediate price reaction not required. In stark contrast is the approach that the Fifth, Sixth, and Ninth Circuits take. In these circuits, it is permissible for a plaintiff to point to a corrective disclosure as a basis for liability even though the stock did not decline for weeks or even months after the purported corrective disclosure (and despite the fact information is assumed to be incorporated promptly for purposes of the fraud on the market presumption). The Ninth Circuit has taken the lead on this issue, holding that it is possible for a plaintiff to prove both materiality and loss causation in an efficient market even though the time between the purported corrective disclosure and the price reaction lags by days, weeks, or even months.

In this case, the Ninth Circuit held that Flynn's analyst reports—which provided no new factual information—could constitute corrective disclosures and suffice to prove loss causation. But by the time the Flynn analyst reports were published, two weeks had passed since Apollo's announcement of the existence of the DOE report and its settlement, and a week had passed since the contents of the DOE report and its potential consequences were discussed in highly negative national newspaper coverage. In ruling that the analyst reports could be considered corrective disclosures, the Ninth Circuit relied upon its earlier decision in *Gilead*, 536 F.3d at 1058, which held that plaintiffs adequately pled loss causation where there was an *82-day gap* between the alleged corrective disclosure and the price

decline. *Gilead* in turn relied on the Ninth Circuit's prior decision in *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920 (9th Cir. 2003), which held that a *51-day* delay between a corrective disclosure and a price decline did not render the information immaterial as a matter of law. *Id.* at 934.

The Fifth Circuit has followed the Ninth Circuit's lead in *Lormand v. US Unwired, Inc.*, 565 F.3d 228 (5th Cir. 2009). *Lormand* involved a series of alleged corrective disclosures regarding the negative effects of a company's program catering to sub-prime credit customers. While there was an immediate price reaction following the final alleged corrective disclosure, the Fifth Circuit held that one of the earlier disclosures could also be a corrective disclosure, even though it "was followed immediately by a stock price increase rather than a decrease." *Id.* at 266 n.33. Citing the Ninth Circuit's decision in *Gilead*, the Fifth Circuit held that "a delayed reaction can still satisfy the pleading requirements for 'loss causation.'" *Id.*[2]

Similarly, the Sixth Circuit has held that an efficient market may take an extended period of time to incorporate information into its price following a

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[2] While the Fifth Circuit went on to say that "*proof* of causation would be more difficult when significant time elapses before the market allegedly reacts," 565 F.3d at 266 n.33 (emphasis in original), the fact that it allowed the case to survive a motion to dismiss indicated that it thought loss causation could be proven even where there was a "delayed reaction" to a corrective disclosure.

corrective disclosure. In assessing the materiality of a tire manufacturer's statements about the safety of its tires, the Sixth Circuit cited favorably the Third Circuit's doctrine that "'information important to reasonable investors (in effect, the market) is *immediately* incorporated into stock prices,'" *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651 (6th Cir. 2004) (quoting *Burlington*, 114 F.3d at 1425) (emphasis added), but then measured the stock price reaction over a six-week period.

B. The Circuits Are Split On Whether The Analysis Of Previously Disclosed Facts Can Constitute A "Corrective Disclosure" In An Efficient Market.

The circuits are also in conflict over whether a recharacterization or analysis of previously disclosed information can be a corrective disclosure, with the Ninth Circuit standing alone in holding that it can.

Five circuits—the Second, Third, Fourth, Fifth, and Eleventh—hold that the opinions and re-characterizations such as those contained in the Flynn reports are not corrective disclosures sufficient to establish loss causation. *See Omnicom*, 597 F.3d at 512; *In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 269-70 (3d Cir. 2005); *Teachers' Ret. Sys. v. Hunter*, 477 F.3d 162, 187-88 (4th Cir. 2007); *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330, 340 (5th Cir. 2010); *Thompson*, 610 F.3d at 689-91. The rule in these circuits is that disclosures constituting merely "confirmatory information" already in the market do

not qualify as corrective disclosures. *Halliburton*, 597 F.3d at 340.

In each of these circuits, it is not enough to show that a stock declined after a second disclosure "amplified" the first, *Thompson*, 610 F.3d at 690-91, or provided "a negative characterization of already-public information," *Omnicom*, 597 F.3d at 512. Nor would it be enough to show that the stock declined after an especially "authoritative" source offered an interpretation of the previously disclosed facts. *Merck*, 432 F.3d at 269-70 (*Wall Street Journal* interpretation of previously disclosed facts was not a corrective disclosure); *Omnicom*, 597 F.3d at 506-07 (accounting professor's publicly expressed opinion that transaction raised a "red flag" did not disclose new facts).

None of the other circuits would accept the Ninth Circuit's concept that the Flynn reports could have been corrective disclosures because they were "more authoritative." App. 2a. Nor would they permit an analyst's downgrade to be considered a corrective disclosure. Consistent with the efficient market premise adopted in *Basic*, these circuits hold that once the facts have been publicly disclosed, a second report of the same information from another source cannot be considered a corrective disclosure, regardless of how authoritative that second source is.

These circuits would reject any notion that an efficient market selectively chooses the information it absorbs based on the source; instead, consistent with *Basic*, they hold that "[t]he efficient market theory . . . posits that *all* publicly available infor-

mation about a security is reflected in the market price of the security." *Thompson*, 610 F.3d at 691 (emphasis added); *accord Halliburton*, 597 F.3d at 334 ("Under the fraud-on-the-market theory, it is assumed that in an efficient, well-developed market *all* public information about a company is known to the market and is reflected in the stock price.") (emphasis added); *see also In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 14 (1st Cir. 2005) ("an efficient market is one in which the market price of the stock *fully reflects all* publicly available information") (emphasis in original).

The Ninth Circuit's ruling that a jury could have concluded that the Flynn reports included "additional . . . fraud-related information" also ignores the critical fact that the Flynn reports did not disclose any "additional" *facts*, which is what *Dura* and the other circuits consider relevant. *See, e.g.*, *Dura*, 544 U.S. at 344 ("[A] person who 'misrepresents the financial condition of a corporation in order to sell its stock' becomes liable to a relying purchaser 'for the loss' the purchaser sustains 'when the *facts* . . . become generally known' and '*as a result*' share value 'depreciate[s].'") (quoting Restatement of Torts § 548A (1976), Comment *b*, at 107) (emphasis added); *Teachers' Ret. Sys.*, 477 F.3d at 187 (only the disclosure of "*new facts* . . . that revealed [a defendant's] previous representations to have been fraudulent" can constitute a corrective disclosure) (emphasis added).

The only information plaintiff suggested was factually new in this case consisted of a securities analyst's *post hoc* assessments of the "risks" of

regulatory action against Apollo, and the "risks" of increased counselor turnover in connection with Apollo's new compensation plan. App. 10a. In other circuits, these assessments and opinions regarding "risks," and the downgrade of Apollo's stock rating, would have been treated as "amplifications" or "negative characterizations," not as new corrective disclosures that could serve as a basis for loss causation. *See, e.g., Merck*, 432 F.3d at 270 (*Wall Street Journal* reporter's analysis of the magnitude of an allegedly improper revenue recognition practice did not constitute a corrective disclosure where the company had previously disclosed its practice).

* * *

The conflicts in loss causation standards among the circuits have become entrenched in the two decades since *Basic* was decided. *See Greenhouse v. MCG Capital Corp.*, 392 F.3d 650 (4th Cir. 2004) (noting the split between the Ninth and Third Circuits on the immediacy issue in the materiality context and declining to "tak[e] a position on this thorny issue"). The uncertainty and conflict will persist until this Court steps in to clarify the standards for establishing loss causation in efficient markets.

II. THE NINTH CIRCUIT'S APPROACH TO LOSS CAUSATION IS INCONSISTENT WITH THE EFFICIENT MARKET THEORY AND WITH THIS COURT'S HOLDINGS IN *BASIC* AND *DURA*.

The Ninth Circuit's view on both issues presented contravenes this Court's holdings and rationales in *Basic* and *Dura*.

Regarding the first issue, *Basic* held "that the market price of shares traded on well-developed markets reflects *all publicly available* information, and, hence, any material misrepresentations." 485 U.S. at 246 (emphasis added). In so ruling, this Court adopted a principle that is embraced by the overwhelming majority of economists. As Nobel laureate William F. Sharpe explained in his seminal textbook, "In an efficient market, investors will incorporate any new information *immediately and fully* in security prices." William F. Sharpe, Gordon J. Alexander & Jeffery V. Bailey, *Investments* 95 (6th ed. 1999) (emphasis added).

Under this view, efficient stock markets generally respond to new information within one day. Eugene F. Fama, *Efficient Capital Markets: II*, 46 J. Fin. 1575, 1601-02 (1991). As a leading law review article (which this Court cited in *Basic*) reports, "[i]mplicit in [the fraud on the market theory] is an acceptance of the efficient market thesis, which states that publicly available information affecting a corporation's prospects is *rapidly absorbed* by the market, that *the information has an immediate impact on the stock price*, and that the marketplace

reacts to both true and false data." Barbara Black, *Fraud on the Market: A Criticism of Dispensing With Reliance Requirements in Certain Open Market Transactions*, 62 N.C. L. Rev. 435, 454 (1984) (cited in *Basic*, 485 U.S. at 247 n.26) (emphasis added).

The Ninth Circuit has effectively rejected *Basic's* ruling that efficient markets incorporate "all" publicly available information into stock prices. Instead, the Ninth Circuit's view is that the same market for the same stock can be both highly efficient and highly inefficient, depending on what stage one asks the question and who benefits from the answer. Thus, the Ninth Circuit has applied a completely different standard of market efficiency in assessing the presumption of reliance on the one hand, and materiality and loss causation on the other.

In the context of establishing the fraud on the market presumption, the Ninth Circuit has stated that market efficiency is characterized by an "'*immediate* response in the stock price.'" *Binder v. Gillespie*, 184 F.3d 1059, 1064-65 (9th Cir. 1999) (quoting *Cammer v. Bloom*, 711 F. Supp. 1264, 1287 (D.N.J. 1989) (emphasis added)). But the Ninth Circuit has expressly adopted a different position with respect to loss causation.

In *America West*, it stated that efficient markets may be "subject to distortions that prevent the ideal of 'a free and open public market' from occurring." 320 F.3d at 934. Accordingly, in the Ninth Circuit, a "plaintiff establishes fraud on the market by demonstrating that a security is actively traded in an

'efficient market,' in which prices immediately reflect all publicly available information," but "an *immediate* response is *not* required for loss causation." *Miller v. Thane Int'l, Inc.*, 615 F.3d 1095, 1103 (9th Cir. 2010) (first emphasis in original).

This asymmetrical approach to market efficiency cannot be reconciled with *Basic* or *Dura*. It is also profoundly unfair. Under the Ninth Circuit's view, the same efficient market that incorporates information immediately when the fraud allegedly takes place, thereby allowing plaintiffs to dispense with establishing the element of individual reliance, somehow then fails to incorporate information for days, weeks, and even months for purposes of assessing materiality and loss causation.

The Ninth Circuit's reference to market "distortions" in its analysis of loss causation contravenes the efficient market principle adopted in *Basic*. The *only* reason for allowing a fraud on the market action to proceed is the presumption that the market price at each moment reflects all publicly available information. If "distortions" delay information from being incorporated into the market price for days, weeks, or even months, then the market simply does not meet the definition of efficiency. Alternatively, it could be that the market is efficient and is "right" and the information was not regarded by the market as material, or even if objectively material, did not cause a plaintiff's loss.

But it cannot be both: the market cannot be efficient for purposes of assimilating a defendants'

fraud immediately into price, and then lazy and unresponsive when that fraud is revealed. As the Third Circuit said, "[a]n efficient market for good news is an efficient market for bad news." *Merck*, 432 F.3d at 271. Moreover, the Ninth Circuit does not even require that the supposed "distortions" be pled, much less proved. They can be simply assumed. *America West*, 320 F.3d at 949 n.1 (Tallman, J., dissenting) ("I am at a loss to understand what evidence the majority employs to discount the non-reaction of the market because the 'market is subject to distortions.' What distortions? The plaintiffs have not alleged any, and in fact have alleged the opposite in order to invoke the fraud-on-the-market theory.").

Regarding the second issue presented, the Ninth Circuit's holding fails to differentiate between facts and opinions. Both can move markets, but under *Dura* it is only fraud revealing facts that can be a basis for proving loss causation.

Under settled law, companies are not required to—and typically do not—make predictions about their stock performance, or offer analyses, opinions, or predictions regarding the *facts* they disclose to the market, or issue ratings on their stock. *See, e.g., In re Sofamor Danek Grp., Inc.*, 123 F.3d 394, 402 (6th Cir. 1997) (en banc) ("predictions not 'substantially certain to hold,' like most matters of opinion, simply do not come within the duty of disclosure"); *Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 831 (8th Cir. 2003) ("[T]here is no duty to disclose 'soft information,' such as a matter of opinion, predictions, or a belief as to the legality of the company's own actions.

Soft information must be disclosed only if virtually as certain as hard facts.") (citation omitted).

But analysts do make predictions and offer analysis of publicly known facts, and their predictions and stock ratings can and do move markets. The SEC has recognized the critical distinction between material facts disclosed by issuers—which can be the subject of misstatements and subsequent corrective disclosures—and the analyses of those facts provided by securities analysts.[3] The Ninth Circuit's ruling that Flynn's analyst reports constituted a corrective disclosure ignores that distinction and runs directly contrary to the loss causation paradigm established in *Dura*.

Under *Dura*, loss causation requires a corrective disclosure of facts that were misstated or concealed by the defendant in violation of law. 544 U.S. at 344. Analyses, opinions, and predictions cannot be "corrective" within the meaning of *Dura*. *See Omnicom*, 597 F.3d at 512 (article did not constitute a corrective disclosure because it did not contain any new "hard fact[s]": "A negative journalistic characterization of previously disclosed facts does not constitute a corrective disclosure of anything but the journalists' opinions."); *Halliburton*, 597 F.3d at 342

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[3] *See* Selective Disclosure and Insider Trading, Release Nos. 33-7881, 34-43154, IC-24599, 65 Fed. Reg. 51,716 (Aug. 24, 2000) at 51,717 (securities analysts "provide value for investors by using their education, judgment and expertise to *analyze* information") (emphasis in original); *id.* at 51,722 (analysts construct a "'mosaic' of information" through a "combination of persistence, knowledge, and insight").

("We have characterized [news commentary and analysts] as merely 'well-informed speculation.'").

Dura requires plaintiffs to establish that their losses were caused by "defendant's fraud," 544 U.S. at 338, not by the "tangle of factors affecting price," *id.* at 343. Analyses and predictions such as those embodied in the Flynn reports are part of this "tangle of factors affecting price"—they are not facts that can constitute a corrective disclosure. Under *Dura*, losses attributable to the fraudulent misrepresentation or concealment of facts are measured by the stock price decline "'when the *facts* . . . become generally known' and 'as a result' share value 'depreciate[s].'" *Id.* at 344 (quoting Restatement of Torts § 548A, Comment *b*, at 107) (emphasis added).

Dura also emphasized that Section 10(b) was not intended "to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations *actually cause*." *Id.* at 345 (emphasis added). By divorcing the revelation of the factual basis for a supposed fraud from any statistically significant price effect, the Ninth Circuit breaks that causal connection.

The connection between a corrective disclosure and a stock price decline is made more attenuated by the passage of time, as more information enters into the market. Under *Basic*, efficient markets incorporate information into stock prices efficiently—not over the nearly three-month period that the Ninth Circuit characterized as "[a] limited temporal gap" in *Gilead*. 536 F.3d at 1058.

The Ninth Circuit's "non-immediacy" standard effectively eviscerates *Dura*. This Court rejected standardless assessments of loss causation in *Dura*, when it overturned the Ninth Circuit's prior rule that plaintiffs could establish causation by showing that the fraudulent statement or omission "touches upon" the reasons that the stock price declined. *See* 544 U.S. at 343 ("To 'touch upon' a loss is not to *cause* a loss, and it is the latter that the law requires.") (emphasis in original). The current Ninth Circuit approach to loss causation is philosophically a return to the "touches upon" standard, and practically invites courts to make inconsistent and inherently subjective rulings.

III. THE QUESTIONS PRESENTED ARE RECURRING ISSUES OF NATIONAL IMPORTANCE, AND THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THEM.

This Court has recognized the importance of well functioning capital markets to the health and vitality of the United States, and the utility of rules governing these markets that are susceptible of consistent application. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006) ("The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated."); *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010) (criticizing the circuits' "collection of tests. . . , complex in formulation and unpredictable in application" for extraterritorial application of Section 10(b)).

While loss causation is an element of a plaintiff's case in Rule 10b-5 cases, it is usually raised by a defendant attempting to disprove an essential element of the plaintiff's case. In the abstract one would not think this should be so hard. If the market really is efficient and does not react when the allegedly misrepresented facts are disclosed, that should be the end of the story—a plaintiff's losses were caused by the "tangle of factors" affecting price, not by a securities fraud.

But the Ninth Circuit, which regularly ranks first or second among the circuits in terms of the number of securities cases filed,[4] has introduced two unnecessary and counterproductive elements of uncertainty into the equation: (1) virtually any time delay—no matter how long—between the factual revelation and the stock price drop will not be sufficient for a defendant to establish a lack of materiality or the absence of loss causation; and (2) the corrective disclosure does not even have to consist of newly revealed facts—the post-prandial ponderings of wise men and women can also suffice if they are sufficiently "authoritative."

These glosses on the holdings in *Basic* and *Dura* substantially diminish the effectiveness of the loss causation defense in a circuit where a quarter of the cases are filed, making it difficult to obtain the dismissal of meritless cases at an early stage, and

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[4] *See* Alexander Aganin, Cornerstone Research, *Securities Class Action Filings 2009: A Year in Review* 25 (2010) (between 1997 and 2008 the Second and Ninth Circuits have ranked either first or second in the number of cases filed and have each accounted for 24% of the securities class actions filed).

clogging the courts with cases whose undeserved settlement value arises from the lack of clear and easy to apply rules. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975) ("[I]in the field of federal securities laws . . . even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment."); *Dura*, 544 U.S. at 347 (expressing concern with "permit[ting] a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value") (quotation omitted); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (securities fraud actions "can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law").

Moreover, on an issue that plays such a significant role in the U.S. economy,[5] it offends traditional notions of justice and fairness for results to be so different depending on where a case is filed.

Recently, the Court has recognized the importance of clear rules in securities cases. *See, e.g.*, *Morrison*, 130 S. Ct. at 2886 (adopting a bright-line "transactional test" that "the purchase or sale is

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[5] Each year since 2000, securities class action settlements have exceeded $2 billion, and the aggregate total since that time exceeds $50 billion. Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, *Securities Class Action Settlements: 2009 Review and Analysis* 1 (2010).

made in the United States, or involves a security listed on a domestic exchange"); *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1793-99 (2010) (clarifying inquiry notice standards for Section 10(b) statute of limitations defenses). The situation among the lower courts when it comes to assessing loss causation is similarly affected by different standards, and loss causation affects a far broader array of cases.

This case presents an excellent vehicle for this Court to review and clarify the standards for proving loss causation. This is one of the rare securities fraud cases that has gone through a full trial on the merits, and thus presents an opportunity for the Court to clarify the standards for not just pleading, but proving loss causation. Decisions rendered at the motion to dismiss stage do not permit the Court to review these important issues on a fully developed factual record. The Court should take this opportunity to adopt clear and uniform standards regarding loss causation in cases governed by the fraud on the market theory adopted in *Basic*.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November 15, 2010

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: APOLLO GROUP, INC. SECURITIES LITIGATION, **POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO,** Plaintiff-Appellant, **v.** **APOLLO GROUP, INC. et al.,** Defendants-Appellees.	No. 08-16971 D.C. No. 2:04-cv-02147-JAT **MEMORANDUM*** (Filed Jun. 23, 2010)

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted March 3, 2010
Pasadena, California

Before: **KOZINSKI**, Chief Judge, **W. FLETCHER**, Circuit Judge and **GETTLEMAN**,** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Robert W. Gettleman, United States District Judge for the Northern District of Illinois, sitting by designation.

The district court erred in granting Apollo judgment as a matter of law. The jury could have reasonably found that the UBS reports following various newspaper articles were "corrective disclosures" providing additional or more authoritative fraud-related information that deflated the stock price. *Cf. In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1058 (9th Cir. 2008) (later disclosure corrective when public initially "failed to appreciate [the] significance" of negative information); *Hanon* v. *Dataproducts Corp.*, 976 F.2d 497, 503 (9th Cir. 1992) (what market understands depends on "intensity and credibility" of information).

Apollo is not entitled to a new trial. The district court did not abuse its discretion by excluding Flynn's potentially confusing deposition testimony, which Apollo had already chosen not to use on cross-examination. *See* Fed. R. Evid. 403; *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008). The district court also properly instructed the jury. It made clear that damages could be awarded only for fraud-related losses, and it was not required to instruct the jury on a theory of liability the plaintiffs hadn't presented.

Finally, there is no basis for remittitur. The jury could have reasonably credited the expert who testified that the fraud revealed by multiple corrective disclosures accounted for $5.55 of the drop in stock price. Damages are limited by the extent of Apollo's fraud, not by the subset of fraud the UBS reports alone revealed. *See In re Dauo Sys., Inc.*, 411 F.3d

1006, 1027 (9th Cir. 2005) ("[Plaintiffs'] economic loss was the decline in their stock value that was the direct result of Dauo's misrepresentations.").

We reverse and remand with instructions that the district court enter judgment in accordance with the jury's verdict.

REVERSED AND REMANDED WITH INSTRUCTIONS.

2008 WL 3072731 (D.Ariz.)

United States District Court,
D. Arizona.
In re **APOLLO** GROUP, INC.
SECURITIES LITIGATION.
This Document Relates To: All Actions.
Master File No. CV 04-2147-PHX-JAT.
Nos. CV 04-2204-PHX-JAT,
CV 04-2334-PHX-JAT.

Aug. 4, 2008.

ORDER

JAMES A. TEILBORG, District Judge.

This securities-fraud class action centers around a Department of Education ("DOE") program review at the University of Phoenix ("UOP"), a wholly-owned subsidiary of Apollo Group, Inc., that began in August 2003 and ended by settlement agreement on September 7, 2004. The Policemen's Annuity and Benefit Fund of Chicago ("PABF"), representing a class of persons who purchased Apollo stock between February 27, 2004 and September 14, 2004, claimed that Apollo and two of its individual officers made false or misleading statements concerning the status of this program review, and that these misrepresentations caused certain investors to suffer economic loss after the truth was fully disclosed to the market by way of two analyst reports (the "Flynn reports") on September 20, 2004. At trial, the Court instructed the jury that loss causation, an essential element of PABF's securities-fraud claim, could be found only if the

Flynn reports were "corrective disclosures." The jury found for PABF.

Apollo and its individual officers now move for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) and, alternatively, for a new trial under Rule 59. The dispositive question presented in the Rule 50(b) motion is whether the evidence at trial was sufficient to support the jury's finding that the Flynn reports were corrective disclosures. The Court finds that it was not, and will therefore grant the Rule 50(b) motion.

I. Background

The Court recites the facts relevant to this motion consistent with the jury verdict.

On February 5, 2004, as part of its ongoing program review at the UOP, the DOE sent Apollo a program review report that preliminarily found that the UOP had violated DOE regulations. Apollo was not required to immediately disclose the report, and it chose not to do so. But on six different occasions thereafter, between February 27, 2004 and September 7, 2004, Apollo misrepresented the actual state of affairs surrounding the program review by making public statements at odds with the existence and contents of the DOE report. On September 14 and 15, 2004, the contents of the DOE report were widely disseminated for the first time through various newspapers articles, including articles in *The Wall Street Journal, The Arizona Republic, and the Chicago*

Tribune. The market did not react to the disclosure of this news in any significant way. Five days later, the Flynn reports were issued. These reports downgraded Apollo's stock for various reasons, some of which PABF argued at trial were necessary to reveal the truth of Apollo's prior misrepresentations. Apollo's stock price fell significantly thereafter.

II. Discussion

A. Motion for Judgment as a Matter of Law

The Ninth Circuit has articulated the applicable "standard of review for post-verdict motions for judgment as a matter of law ('JMOL')" as follows:

> The trial court can overturn the jury and grant such a motion only if, under the governing law, there can be but one reasonable conclusion as to the verdict. In other words, the motion should be granted only if there is no legally sufficient basis for a reasonable jury to find for that party on that issue. In ruling on a motion for JMOL, the court is not to make credibility determinations or weigh the evidence and should view all inferences in the light most favorable to the nonmoving party. The court must accept the jury's credibility findings consistent with the verdict. It must disregard all evidence favorable to the moving party that the jury is not required to believe. The court may not substitute its view of the evidence for that of the jury.

Winarto v. Toshiba Am. Elecs. Components, Inc., 274 F.3d 1276, 1283 (9th Cir.2001) (internal citations and quotations omitted).

To recover for securities fraud under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, a plaintiff must establish "'loss causation,' *i.e.*, a causal connection between the material misrepresentation and the loss." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005). One way in which the plaintiff can prove this element is by showing that a corrective disclosure caused the stock price to decline.[1] *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, ___ F.3d ___, No. 06-55826, at 9267 (9th Cir. July 25, 2008) (stating that the market must "learn[ ] of and react[ ] to [the] fraud"); *In re Daou Sys., Inc.*, 411 F.3d 1006, 1026 (9th Cir.2005); *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 175 (2d Cir.2005); *Omnicom Group, Inc. Sec. Litig.*, 541 F.Supp.2d 546, 551 (S.D.N.Y.2008). A "corrective disclosure" is a disclosure that reveals the fraud, or at

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[1] Isolating the effect of a corrective disclosure on a stock price requires expert testimony. The tool most often used by experts to isolate the effect of a corrective disclosure on a stock price is the "event study." *In re Apollo Group, Inc. Sec. Litig.*, 509 F.Supp.2d 837, 844 (D.Ariz.2007) (citing *In re Imperial Credit Indus., Inc.*, 252 F.Supp.2d 1005, 1014 (C.D.Cal.2003)). In grossly oversimplified terms, the event study enables an expert to pinpoint any decline in the stock price attributable to market factors unrelated to the corrective disclosure. Once this is accomplished, if a statistically significant price decline remains, then the expert can be reasonably certain that the corrective disclosure, and thus the fraud, caused that remaining decline.

least some aspect of the fraud, to the market. *See Lentell,* 396 F.3d at 175 n.4 (holding that, to be corrective, a disclosure must "reveal to the market the falsity of the prior [representations]); *Omnicom,* 541 F.Supp.2d at 551 (stating that "a disclosure need not reflect every detail of the alleged fraud" but "must reveal some aspect of it"). A disclosure that does not reveal anything new to the market is, by definition, not corrective. *Omnicom,* 541 F.Supp.2d at 551.

At trial, as at summary judgment, PABF's loss-causation theory, as articulated by its expert witness, Dr. Steven P. Feinstein, depended entirely on the jury finding the Flynn reports to be corrective disclosures. Apollo argues that the evidence was insufficient to support such a finding for two independent reasons.

First, Apollo contends that a market analyst's opinion – which is all the Flynn reports were – is not, and never can be, a "corrective disclosure." Apollo maintains that, to be corrective, a disclosure must reveal *facts* that are necessary to correct the falsity of prior misstatements or omissions, as opposed to simply *analyzing* previously disclosed facts. The Court considered and rejected this argument at summary judgment, stating:

> In order to grant summary judgment to Defendants on this issue, the Court would have to conclude as a matter of law that a market professional's analysis of facts that had been previously disclosed to the investing public can *never* be a corrective disclosure. Defendants have not

> cited, and this Court has not found, any case that supports this proposition.

In re Apollo Group, Inc. Sec. Litig., 509 F.Supp.2d at 846 (emphasis added). Although it appears that at least one district court has since concluded otherwise, see *Omnicom*, 541 F.Supp.2d at 552, the Court will not retreat from its prior holding. To do so, and hold otherwise, would give companies the perverse incentive to indulge in opaque, piecemeal disclosures, specially designed to avoid any market reaction to the news. *See In re Merck & Co., Inc. Sec. Litig.*, 432 F.3d 261, 271 (3d Cir.2005) (declining to hold that analysis of previously disclosed facts can never be a corrective disclosure because the court did not "wish to reward opaqueness"). This Court has no desire to encourage corporate gamesmanship of this kind.

With that said, the Court's rejection of Apollo's rigid, facts-only approach to corrective disclosures is not to deny that the typical securities fraud will be fully revealed through the disclosure of facts, without the need for any subsequent analysis. As the *Merck* court stated, "An efficient market for good news is an efficient market for bad news." 432 F.3d at 271. The situations in which the pertinent facts are obfuscated in such a way, or are of such complexity, as to require someone to connect the dots for a bewildered market represent a very rare type of securities-fraud case, and would not be the rule. The Court's position simply recognizes that an efficient market is not necessarily an omniscient one.

Second, Apollo contends that, even accepting the premise that analysis of existing facts may sometimes be necessary to reveal a fraud to the market, the Flynn reports were not necessary to reveal the fraud in this case because they did not provide any new, fraud-revealing analysis. The Court agrees. At trial, there were only three aspects of the Flynn reports that PABF contended were corrective,[2] and the evidence was insufficient to show that any one of these aspects was in fact corrective.

First, PABF claimed that the Flynn reports were the first to predict future regulatory problems as a result of the previously disclosed contents of the DOE report. This claim, however, was demonstrably false, as evidenced in particular by a *Chicago Tribune* article entitled "School Fine May Foretell Crackdown," published five days before the Flynn reports were issued. [Tr. Ex. 14083-R (Doc. # 559).] That article – in the context of discussing the DOE's investigation of the UOP, the findings of wrongdoing contained in the DOE report, and the subsequent

---

[2] Actually, PABF only explicitly argued for two corrective aspects to the Flynn reports. [Tr. 4062:20-23 ("[T]he only new information is that she has the report and she's talked to enrollment counselors. That's the only new information. There's no other information.").] But while discussing these two allegedly corrective aspects, PABF also argued that the reports were corrective because they were the first to tie future regulatory problems to the DOE report [Tr. 4059:19-4062:5], an argument also made at summary judgment, *In re Apollo Group*, 509 F.Supp.2d at 845.

"record fine" that resulted – reported that "leading industry executives said . . . that investigations may lead to stricter regulatory control of their sector and spark the interest of Congress." [*Id.*] The article also reported that Todd Nelson himself, Apollo's chief executive officer at the time and one of the individual defendants in this lawsuit, "told an investors conference in New York that [he was] concerned about investigations into for-profit education companies" like the UOP. [*Id.*] Thus, contrary to PABF's contention at trial, Flynn was not the first to tie future regulatory problems to the DOE report, and the jury therefore could not properly conclude that her reports were corrective for this reason.

Second, PABF claimed that the Flynn reports revealed for the first time that the UOP was experiencing increasing turnover among its enrollment counselors as a result of a new compensation plan. This claim, however, was factually wrong. The uncontradicted evidence at trial was that enrollment-counselor turnover actually decreased after the implementation of the new compensation plan. [Tr. 2408:1-2411:5.] As a matter of logic, false information cannot possibly be corrective information. Moreover, although PABF presented evidence arguably linking the claim of increasing enrollment-counselor turnover to *the DOE report,* PABF did not present any evidence linking this claim to Apollo's misrepresentations. Thus, the jury could not properly conclude that the Flynn reports were corrective on this basis.

Third, PABF claimed that the Flynn reports were corrective because it was "obvious from the report[s]" that Flynn had "read the [DOE] report." [Tr. 4059:1-2.] But this, of course, is nonsense. What Flynn did or did not read before issuing her reports is irrelevant. All that matters is what she actually disclosed to the market in her reports, and PABF has conceded, as it must, that Flynn did not disclose *any* of the DOE report's contents in her reports, much less any new contents.[3] [Tr. 4059:2.]

Securities-fraud actions are "available, not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *Dura*, 544 U.S. at 345; *see also Basic, Inc. v. Levinson*, 485 U.S. 224, 252 (1988) (White, J., concurring in part and dissenting in part) (rejecting an argument that "would effectively convert Rule 1 Ob-5 into a scheme of investor's insurance"). The evidence at trial undercut all bases on which PABF claimed the Flynn reports were corrective. Thus, although PABF demonstrated that Apollo misled the market in various ways

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[3] In its opposition to Apollo's motion for judgment as a matter of law, PABF argues that two other bits of information disclosed in the Flynn reports were also corrective: (1) Flynn's statement that enrollment counselors had reported that enrollment targets were getting harder to hit; and (2) the fact that the UOP had adopted a new compensation plan. But neither bit of information was linked in any way to Apollo's prior misrepresentations. [Tr. 2170:19-2171:25.] Thus, the jury could not have found the Flynn reports to be corrective on either of these bases.

concerning the DOE program review, PABF failed to prove that Apollo's actions caused investors to suffer any harm. Therefore, Apollo is entitled to judgment as a matter of law.

B. Motion for New Trial

Apollo also moved in the alternative for a new trial under Federal Rule of Civil Procedure 59. The Court is required to conditionally rule on this motion in the event the appellate court reverses the grant of judgment as a matter of law. See Fed.R.Civ.P. 50(c)(1).

Rule 59(a) states that "after a jury trial," a new trial may be granted "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Reasons for granting a new trial historically include prejudicial evidentiary rulings, *Dorn v. Burlington N. Santa Fe R.R.*, 397 F.3d 1183, 1189 (9th Cir.2005), erroneous or inadequate jury instructions, *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir.1990), attorney misconduct, *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 346 (9th Cir.1995), and a verdict that, in the judge's view, is against the clear weight of the evidence (or constitutes a miscarriage of justice), *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir.2007). Apollo maintains that all of these reasons warrant a new trial in this case.

1. Challenged Evidentiary Rulings

Apollo asserts three errors in the Court's evidentiary rulings.

First, Apollo argues that the Court's exclusion of Kelly Flynn's testimony as to the meaning of her reports was prejudicial, especially in light of the fact that the Court permitted PABF's expert witness, Dr. Feinstein, to testify on the same subject. The Court disagrees. The Flynn reports were admitted as evidence of what the market was told on September 20, 2004. What these reports meant *to the market* could only be gleaned from the words contained in them. Permitting Flynn to testify as to the meaning of these words would have invited the jury to determine the meaning of the Flynn reports based on the author's unspoken thoughts and intentions rather than on the words themselves. The danger of confusion and unfair prejudice far outweighed whatever probative value such testimony may have had. See Fed.R.Evid. 403. Any testimony of the parties' loss-causation experts on the same subject simply did not present the same danger.

Apollo next argues that the Court's refusal to permit Apollo's legal advisors to testify about the "rationale" behind their legal advice was prejudicial error. Again, the Court finds no error in this evidentiary ruling. Apollo's legal advisors were permitted to testify as to the advice they actually communicated to Defendant Nelson, as evidence of Nelson's state of mind. They were also permitted to testify as to their

qualifications and the professional capacity in which they rendered the advice – i.e., as lawyers with the fiduciary duty and ethical obligation to give their client the best legal advice they can – to establish why Nelson might have properly relied on their advice. But to allow Apollo's advisors to explain why they gave particular advice would have permitted these lawyers to offer what would have amounted to undesignated expert opinion on the governing law of the case, thereby invading the province of the Court and inviting jury confusion. Moreover, to the extent PABF attacked the credibility of these legal advisors by attempting to paint them as mere "highly-paid advocates," Apollo had an adequate opportunity to rehabilitate them by showing that the lawyers acted in their professional capacity, with all the ethical duties that accompany it.

Finally, Apollo argues that it was prejudicial error to allow Dr. Feinstein to testify about the *risks* of the DOE report as a proxy for the *materiality* of the report, one of the ultimate issues in the case. The Court, however, sees a meaningful distinction between, "A reasonable investor would have considered the DOE report to be material," and, "A reasonable investor would have considered the DOE report to expose certain risks." Furthermore, the fact that the Court could have permitted Dr. Feinstein to testify explicitly concerning the materiality of the report, see Fed.R.Evid. 704(a) (stating that opinion testimony is generally "not objectionable" merely "because it embraces an ultimate issue to be decided by the trier

of fact"), clearly demonstrates that the Court did not err in admitting this testimony.

2. Jury Instructions

Apollo asserts a number of errors and inadequacies in the jury instructions. But after reviewing the parties' arguments and the jury instructions as a whole, the Court is convinced that the instructions "fairly and adequately cover[ed] the issues presented, correctly state[d] the law, and [were] not misleading." *Chuman v. Wright,* 76 F.3d 292, 294 (9th Cir.1996). The Court's reasons, as stated on the record, will speak for themselves in this regard.

3. Attorney Misconduct

Apollo argues that PABF's allegedly repeated references to irrelevant topics and its alleged use of a "golden rule" argument – asking the jurors to place themselves in the shoes of the class members – prejudiced its right to a fair trial. "A new trial is warranted on the ground of attorney misconduct during the trial where 'the flavor of misconduct . . . sufficiently permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'" *Anheuser-Busch, Inc.,* 69 F.3d at 346 (quoting *Kehr v. Smith Barney, Harris Upham & Co.,* 736 F.2d 1283, 1286 (9th Cir.1984)). Although there can be no doubt that PABF succeeded in delving into some irrelevant matters early in the trial, and to the extent PABF's

argument during closing can even properly be characterized as an improper "golden rule" argument,[4] the Court is not persuaded that PABF's actions tainted the entire proceeding.

4. Miscarriage of Justice

Finally, Apollo contends that "[t]he jury in this case returned a verdict that is a miscarriage of justice." But to the extent the appellate court reverses this Court and rules that sufficient evidence supported the jury's finding that the Flynn reports were corrective disclosures, the Court is satisfied that justice was achieved, for Apollo and the class members.

In sum, none of the reasons cited by Apollo warrant a new trial in this case. Therefore, pursuant to Federal Rule of Civil Procedure 50(c)(1), the Court will conditionally deny Apollo's motion for new trial.

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[4] To determine whether *a reasonable investor* would have viewed the DOE report as material, PABF's counsel invited the jury members to ask themselves whether *they personally* would have viewed the report as material *if they were going to invest in Apollo*. [Tr. 4044:8-12 ("Read the [DOE report] and sit down and say to yourself, honestly, if I was going to invest in this company would this give me a reason to pause? Would I find that this altered, significantly altered the total mix of information in the marketplace? Would I find this to be important?").] Any error in this argument was harmless at worst.

III. Conclusion

The evidence at trial was insufficient to support the jury's finding that the Flynn reports were corrective disclosures. Therefore, PABF failed to prove loss causation, and Apollo is entitled to judgment as a matter of law.

For the foregoing reasons,

IT IS ORDERED that Apollo's Motion for Judgment as a Matter of Law (Doc. # 524) is **GRANTED;**

IT IS FURTHER ORDERED that Apollo's Motion for New Trial (Doc. # 523) is **DENIED;**

IT IS FURTHER ORDERED that, for the reasons stated on the record at the motion hearing held on August 4, 2008:

(1) PABF's Motion to Amend the Judgment (Doc. # 521) is **DENIED;**

(2) Apollo's Motion to Correct the Trial Record (Doc. # 550) is **GRANTED IN PART AND DENIED IN PART;** and

(3) Apollo's Motion for Remittitur (Doc. # 525) is **DENIED;**

IT IS FURTHER ORDERED that the Clerk of the Court shall vacate the judgment at Doc. # 508 and the award of costs at Doc. # 553, and shall enter judgment in favor of Defendants and against Plaintiffs.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: APOLLO GROUP, INC. SECURITIES LITIGATION,	No. 08-16971
	D.C. No. 2:04-cv-02147-JAT
POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO, Plaintiff-Appellant,	**ORDER**
	(Filed Aug. 17, 2010)
v.	
APOLLO GROUP, INC. et al., Defendants-Appellees.	

Before: **KOZINSKI**, Chief Judge, **W. FLETCHER**, Circuit Judge and **GETTLEMAN**, District Judge.*

The petition for rehearing and rehearing en banc is denied. *See* Fed. R. App. P. 35, 40.

* The Honorable Robert W. Gettleman, United States District Judge for the Northern District of Illinois, sitting by designation.

15 U.S.C. § 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

> **(a)(1)** To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
>
> **(2)** Paragraph (1) of this subsection shall not apply to security futures products.
>
> **(b)** To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial

precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78o, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

15 U.S.C. § 78u-4(b)(4)

(4) Loss causation

In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages.

17 C.F.R. § 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

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No. 10-649

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States

APOLLO GROUP, INC., TODD S. NELSON, AND KENDA B. GONZALES,
Petitioners,

v.

POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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February 4, 2011

QUESTION PRESENTED

Petitioners attempt to paint this case as involving broad questions of securities law, but in fact the dispute presented is narrow and fact-specific. In its current posture, the case presents one question:

> Whether the record evidence was sufficient for a properly instructed jury to find that a stock analyst's reports issued on September 20, 2004, immediately before an economically and statistically significant decline in the stock price of corporate petitioner Apollo Group, Inc., were corrective disclosures that respondent could employ as part of its proof of loss causation.

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INTRODUCTION

Petitioners Apollo Group, Inc., its former chief executive officer Todd Nelson, and its former chief financial officer Kenda Gonzales (collectively, "Apollo") seek review of a jury verdict finding them liable for securities fraud. After weeks of testimony, including expert testimony on both sides about the behavior of Apollo's stock price, the jury found that Apollo defrauded its investors by making misrepresentations about a highly critical report by the U.S. Department of Education ("DOE") that had major implications for Apollo's future prospects.

Apollo now seeks to escape that verdict by asking the Court to rule that too much time passed between the date that its fraud was revealed and the date that its stock price fell, thereby precluding its investors as a matter of law from proving that they were harmed by its fraud. Any such rule would be inapplicable here, because the jury, dutifully applying the instructions Apollo concedes are correct, actually found a stock price decline that came immediately after a fraud-revealing disclosure and continued into the next day. That finding is not only correct and consistent with every court of appeals decision on analogous facts, but also far too fact-specific to warrant this Court's review.

Apollo also seeks a second rule: that information received by the market cannot reveal a fraud if it constitutes analysis of, synthesis of, or commentary on previously disclosed information. That rule, too, cannot apply on the facts necessarily accepted by the jury: that fraud in this case was revealed by an investment analyst who found new, fraud-related information about Apollo that alerted investors to the increased risks arising from the DOE Report and

the corrective actions demanded by DOE and taken by Apollo in response to the Report.

Apollo's arguments in favor of review are unpersuasive. Cases involving months-long gaps between the revelation of the fraud and the fall in the investor's stock price are simply inapposite, as is any tension between the circuits over how to approach such scenarios. The court below rightly perceived this case as a fact-specific application of well-settled law, and there is no reason for this Court to review that judgment.

STATEMENT OF THE CASE

Apollo is the largest for-profit institution of higher education in the United States. The University of Phoenix ("UOP") accounts for 95% of Apollo's revenues. UOP in turn derives 60% of its revenues from federal student loans issued under Title IV of the Higher Education Act of 1965 ("Title IV"). To receive funds from Title IV loans, UOP needed (and had) a program participation agreement with DOE. That agreement "condition[ed] . . . [UOP's] eligibility" for Title IV loans on (among other things) a prohibition on making "any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities." 20 U.S.C. § 1094(a)(20). This case is about misrepresentations and omissions from Apollo to its investors about a DOE report finding that UOP had violated that prohibition and demanding corrective action to address the violations, as well as about the consequences for UOP's future business from DOE's finding.

Apollo seeks judgment as a matter of law after an adverse jury verdict following instructions that

in relevant part largely tracked those submitted by Apollo (and that Apollo admits were "correct[]," Pet. 10). A court "entertaining [such] a motion" must "review all of the evidence in the record" and must "draw all reasonable inferences in favor of the nonmoving party." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 151 (2000). It "may not make credibility determinations or weigh the evidence." *Id.* Respondent sets forth the following summary of the evidence in light of that standard.

1. In August 2003, the DOE began a "Program Review" of UOP's compliance with Title IV. The Program Review included witness interviews, site inspections, and a lengthy document review. It was followed by a Program Review Report (the "Report"). On February 5, 2004, Apollo received a copy of the Report from DOE. Excerpts of Record ("ER") 370.

The Report's findings were damning. As DOE summarized it, the Report made "a serious finding" that UOP was using an "improper incentive compensation system for those involved in recruiting activities" and was "systemically engag[ing] in actions designed to mislead [DOE] and to evade detection" of its misconduct. *Id.* DOE described these findings as showing a "substantial breach of [UOP's] fiduciary duty." *Id.* Among other things, the Report found that "UOP bases [recruiters'] salaries solely on the number of students they enroll," ER379, and that UOP employed "evasion" and "euphemisms" to conceal "the fact that UOP pays distinct and significant financial incentives solely based on recruiters' success in securing enrollments," ER396.[1]

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[1] These findings were particularly damaging to Apollo because, as the evidence later showed, it previously had an excellent reputation for regulatory compliance. As one analyst put

In the Report, DOE demanded that Apollo take corrective actions, including "substantial and comprehensive changes to the salary compensation system for its recruiters and their direct supervisors." ER401. In June 2004, Apollo changed its compensation plan for its recruiters by including explicit weighted percentages for the different factors that were used to determine compensation. ER222-25. The change prevented recruiters' supervisors from making salary determinations based solely on the number of enrollments that a recruiter obtained. ER223-24.[2] Apollo "[s]ubmit[ed]" the new compensation plan for review by DOE as part of a "corrective action plan to respond to [DOE's] concerns" in order to obtain "closure" with DOE and avoid "similar findings in the future." ER367-68.

In addition, on September 1, 2004, Apollo paid $9.8 million to DOE as part of a settlement of the dispute arising out of the Report. This payment was the largest fine ever imposed by DOE on a for-profit university. ER63-64.

2. The jury was asked to consider whether Apollo made "an untrue statement of material fact or omit[ted] a material fact necessary under the circumstances to keep the statements that were made from being misleading" when publicly discussing its relationship with DOE and the program review

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it, the investment community had perceived Apollo as being as "pure as the driven snow." ER672 (internal quotation marks omitted).

[2] Apollo's chief human resources officer testified that the June 2004 changes to Apollo's compensation plan were "material" and that any time "you change something material as compensation" it creates risks of increased employee dissatisfaction and lower productivity. ER224, ER227-28.

throughout the class period. As to each statement the jury answered "yes." *See* App., *infra*, 1a-2a (Verdict Form).[3] Petitioners did not disclose the existence of the DOE Report until announcing the settlement with DOE, and the jury was asked whether petitioners Apollo and Nelson then continued to mislead the market about the Report's highly negative findings about Apollo's recruitment compensation scheme. The jury answered "yes." *See id.* at 2a-3a, 6a-7a. The verdict reflects the jury's conclusion that petitioners never revealed that DOE had demanded that Apollo make comprehensive changes to its system for compensating recruiters or that Apollo had made such changes. Not until September 20, 2004, was there a full, adequate disclosure of these facts and their implications on Apollo.

As an example of these false and misleading statements, in March 2004, more than five weeks after receiving the Report, petitioner Todd Nelson (who was then Apollo's CEO) mentioned to industry analysts during a conference call that DOE had conducted a "normal" and "ongoing program review." ER511. When asked "when *any* type of report will be issued" by DOE, Nelson answered that it was "tough to say." ER515 (emphasis added). He also told the analysts that Apollo was "very comfortable" that the program review would lead to "nothing that would be material." *Id.* In fact, Nelson consciously recognized that the Report and the changes it required were material to Apollo, and he sought to prevent the pub-

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[3] The knowingly false or misleading character of Apollo's corporate statements was found by the jury, *see* App., *infra*, 2a-3a, and is not challenged in Apollo's petition. The same is true for the individual petitioners. *See id.* at 6a-7a (Nelson), 9a-10a (Gonzales).

lic release of the Report by writing to the Secretary of Education, urging that DOE not publicly release the Report. ER353. In response, DOE did not release the Report. Upon examination at trial, Nelson was asked whether he had contemporaneously believed that public release of the report would "adversely impact the stock price of Apollo's securities," and he answered: "Absolutely, yes." Trial Transcript ("Tr.") 1103.

On September 7, 2004, shortly after its agreement to pay DOE $9.8 million, Apollo issued a press release stating that it was "pleased to announce" an "agreement" with DOE "to resolve . . . the [UOP] program review." ER568. The press release minimized the significance of the resolution with DOE by disclosing it along with several other pieces of information, including the positive news that Apollo would be expanding into Mexico. It contained no substantive information about the contents of the Report.

The same day, Nelson told analysts about the settlement of the DOE program review and in doing so he made several false and misleading statements. He described the Report merely as an "interim report"[4] with a "negative tone." ER572. He said that Apollo had "decided to settle this issue now rather than later for $9.8 million and put it behind us," assuring the market that the settlement would "take[] away, hopefully, any clouds that may be lingering with regulatory issues." ER572.

Nelson also said that the settlement would not "have a material impact on the growth of the com-

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[4] On August 26, 2004, DOE had advised Apollo that it "d[id] not consider the [Report] to be an 'interim' report" and that the Report was a "discrete final action" by DOE. ER547.

pany or our financial performance." ER572. He mentioned the company's new compensation scheme, which he said would make it more "transparent," but stated that it was "unrelated" to the dispute with DOE. ER574. He did not disclose to the market the substance or contents of the Report; in particular, he said nothing about DOE's finding that Apollo had engaged in systemic deception, nor did he disclose DOE's demand for comprehensive changes to Apollo's compensation scheme for recruiters – the engine of Apollo's revenue.

3. On September 8, 2004, several Wall Street analysts, none of whom had actually read the Report, issued reports accepting Apollo's claim that its regulatory problems were over. One analyst writing on September 8 described the disclosure as a "positive for the company" that "could put to rest some of the potential 'noise' . . . related to the program review." ER658. Another described the settlement as "remov[ing] virtually every material legal/regulatory issue" faced by Apollo. ER674. Notably, analyst Kelly Flynn of UBS Investment Services issued a report on September 8, 2004, adopting this theme and suggesting that the settlement "***may reduce [Apollo's] near-term event risk.***" ER624. Apollo's stock price had been $82.72 on September 7. It dropped slightly to $82.07 on September 8, and further to $80.50 on September 9. ER602-03.

On September 14 and 15, several newspapers published articles describing some of the Report's findings. The articles related some of the Report's negative findings and noted that Apollo had "disclosed few details" about the Report's contents. ER672. The articles also quoted Nelson describing the Report as "very, very unfair," ER580, and "totally

false," ER672. Neither these newspaper articles nor the prior analyst reports contained any details about the material changes to Apollo's compensation system made in response to the Report or revealed that those changes were material and increased the operating risks associated with its future prospects. Apollo's stock price had been $80.63 on September 13. It dropped slightly to $80.09 on September 14, and further to $78.68 on September 15. ER603.

On September 20, having received and read the Report, education specialist Kelly Flynn of UBS Investment Services, who had issued a report on September 8, *see supra* p. 7, released two investment analyses about Apollo. She concluded that "the contents of the [Report] may cause more concerns about [Apollo's] regulatory risk," ER502, and that Apollo's "enrollment growth [could] be hurt by," among other things, "increasing enrollment advisor turnover," ER491. She also reported that current and former recruiters had told her that "internal enrollment targets were getting harder to hit" and that "turnover ha[d] increased since [the] 6/04 intro[duction] of [the] new comp[ensation] plan." ER502. Flynn was the first investment analyst to review the report and was also the first to interview Apollo's recruiters. Apollo's stock price had been $78.35 on September 17 (a Friday). It immediately dropped to $75.82 on September 20, and further to $72.00 on September 21. ER603. This two-day decline was statistically significant.

4. On October 12, 2004, a complaint was filed against Apollo for securities fraud. Respondent was appointed lead plaintiff by the district court. The district court denied Apollo's motions to dismiss and for summary judgment, and certified a class of inves-

tors in Apollo's stock. A jury trial commenced on November 14, 2007, and lasted 22 days.

Loss causation was a heavily contested issue at trial. Both sides presented expert evidence about the significance of the Report and the subsequent disclosures, particularly Flynn's September 20 reports. Dr. Steven Feinstein, an economist testifying for the investors, conducted an event study and gave an opinion that identified new information contained in the September 20 reports that revealed the fraud. Dr. Feinstein's analysis parsed out other factors that could have otherwise impacted Apollo's stock price, including the movement of the stocks of the for-profit education sector, other non-fraud-related factors, and previously disclosed information. Tr. 1977-87; ER161-64. Apollo's expert, Dr. Kenneth Lehn, conducted an event study that confirmed that Apollo's stock price decline between September 20-21 was statistically significant. Tr. 3456-57; Trial Exhibit ("Ex.") 24281, at 472-75. This point was uncontested at trial. Both experts agreed with the price data and calculations used by the other and both agreed that their analyses were designed to account for "random" movement. ER90, ER259-61, ER263; Tr. 2003-04. Despite this, and while acknowledging that "there's only a 5 percent chance that what you are seeing is random," Dr. Lehn contended that the statistically significant stock decline was due to "random" chance. ER263.

At the close of the investors' case, Apollo sought judgment as a matter of law, contending that the investors could not prove loss causation because Flynn's analysis did not contain "new facts . . . that demonstrate[d] the falsity of something that [Apollo] had previously . . . said." Tr. 2254. The district court

denied that motion, finding that the "jury c[ould] conclude that the facts . . . dribble[d] into the marketplace" over time, and that Flynn had "connect[ed] the dots in such a way that they became the corrective disclosure." ER209.

The district court instructed the jury that "the alleged misrepresentations and omissions in this case could have caused the plaintiff to suffer damages only if you determine that the analyst reports issued by Kelly Flynn on September 20, 2004 were corrective disclosures" and that, "[i]f you conclude that these reports were not corrective disclosures, then you cannot find that a misrepresentation or omission caused the plaintiff to suffer damages." ER298-99. Petitioners acknowledged that "this instruction is aimed at preventing . . . the jury from looking at . . . [earlier] disclosures and . . . by making them determine that the Flynn report was a corrective disclosure." Tr. 3783-84.

So instructed, the jury gave a verdict in favor of the investors on every element of a Rule 10b-5 claim, finding that Apollo had made (i) false or misleading statements (ii) upon material matters (iii) with scienter (iv) proximately causing damage to the investors. Nelson's statements on the September 7, 2004 conference call announcing Apollo's settlement with DOE were among the statements that the jury found fraudulent. *See* App., *infra*, 5a.

5. On August 4, 2008, the district court granted Apollo's renewed motion for judgment as a matter of law, departing from its earlier reasoning and ruling that there was no evidence to support the jury's finding on loss causation. The court first rejected Apollo's argument that, as a matter of law, "a market analyst's opinion . . . is not, and never can be, a

'corrective disclosure.'" Pet. App. 8a. The court expressed concerns that such a rule would "give companies [a] perverse incentive to engage in opaque, piecemeal disclosures," and "encourage corporate gamesmanship." *Id.* at 9a. The court further observed that the Third Circuit had expressly declined to adopt any such rule in *In re Merck & Co., Inc. Securities Litigation*, 432 F.3d 261 (3d Cir. 2005).

The district court, however, did accept Apollo's narrower, case-specific argument that "the Flynn reports were not necessary to reveal the fraud in this case because they did not provide any new, fraud-revealing analysis." Pet. App. 10a. In doing so, the court stated that "Flynn was not the first to tie future regulatory problems to the DOE report" because the September 14 and 15 articles had already done so. *Id.* at 11a. It stated that the link Flynn drew between the Report and increased turnover among Apollo's recruiters was "factually wrong" and therefore could not "possibly be corrective information," and also that the investors "did not present any evidence linking this claim to Apollo's misrepresentations." *Id.* Finally, the court stated that it did not matter that Flynn was the first analyst to read the DOE Report because she "did not disclose any of the [Report's] contents" to the market. *Id.* at 12a.

In a footnote, the district court also acknowledged that the investors had presented two additional grounds for concluding that Flynn had made a corrective disclosure: "(1) Flynn's statement that enrollment counselors had reported that enrollment targets were getting harder to hit; and (2) the fact that the UOP had adopted a new compensation plan." *Id.* at 12a n.3. The court rejected those additional

grounds because it found they were not "linked in any way to Apollo's prior misrepresentations." *Id.*[5]

6. On March 3, 2010, the Ninth Circuit reversed in an unpublished memorandum opinion. The panel (Kozinski, C.J., Fletcher, J., and Gettleman, D.J., by designation) disposed of Apollo's loss-causation claim by reasoning that "[t]he jury could have reasonably found that the UBS reports following various newspaper articles were 'corrective disclosures' providing additional or more authoritative fraud-related information that deflated the stock price." Pet. App. 2a. On August 17, 2010, the court of appeals denied rehearing and rehearing en banc.

REASONS FOR DENYING THE PETITION

I. APOLLO HAS FAILED TO SHOW ANY RELEVANT CONFLICT IN THE CIRCUITS

A. There Is No Relevant Circuit Conflict About the Timing of Corrective Disclosures

Apollo contends that the circuits are divided on the question whether a price decline "weeks or months" after a corrective disclosure is sufficient to support loss causation as a matter of law. Pet. i. This case does not present that question because the jury was, as petitioners acknowledged, correctly instructed that it could *only* find for the investors if it found that Flynn's September 20 reports were corrective disclosures. *See supra* p. 10. The jury *did* find for the investors: therefore, it concluded that Flynn's

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[5] The district court also rejected Apollo's motion for a new trial, its various evidentiary challenges, and its attempt to obtain remittitur. The court of appeals upheld these rulings, and Apollo has not challenged them in its petition.

September 20 reports were corrective disclosures.[6] The jury's necessary finding of loss causation from the immediate stock drop on that day and the following day, therefore, involves no delay of "weeks or months."

Further, even if the jury had relied upon the September 14 and 15 newspaper articles as additional corrective disclosures, the delay between those dates and the end of the stock price decline was only four trading days. Apollo argues repeatedly that this case involves a delay of as long as "two weeks," Pet. 9, 13, 18, but in doing so simply ignores the jury's finding that Apollo's initial announcement on September 7 was itself materially false and misleading, *see* App., *infra*, 1a-2a, 5a, and so could hardly have been a corrective disclosure. Apollo does not challenge (or acknowledge) that finding in its petition. Its contention that this case involves a two-week delay between the revelation of fraudulently concealed information and the market's reaction to that revelation is therefore unsupported by the record.

In any event, Apollo substantially overstates the disagreement among the circuits and mischaracterizes the cases upon which it relies. All of them can be straightforwardly distinguished from this case.

First, Apollo cites (at 15-16) *Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000) (Alito, J.), in which the Third Circuit stated that, "in an efficient market, the materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price of the firm's

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[6] "A jury is presumed to follow its instructions," especially where, as here, "each of the jurors affirmed in open court the verdict." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *see* Tr. 4120-22.

stock." *Id.* at 282. The Third Circuit's statement in *Oran*, however, must be read in light of the facts of that case, which involved a delay of more than two months between the disclosure of concealed information and the price drop for which investors sought to recover. *See id.* at 280, 282-83 (disclosure on July 8, 1997; price drop beginning on September 15, 1997).[7] *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410 (3d Cir. 1997) (Alito, J.), the other Third Circuit case on which Apollo relies, similarly involved a delay of "*approximately two months*" between the disclosure of concealed information and its effect on the company's stock price. *Id.* at 1425.

The Third Circuit's conclusions in those cases that a two-month delay in market reaction precluded a securities-fraud plaintiff from showing materiality as a matter of law are irrelevant to the present case. It is entirely consistent with *Oran* and *Burlington Coat Factory* to hold that a jury could reasonably find loss causation in light of the far shorter interval at issue here (whether that interval is considered to be the day of the fraud-revealing disclosure and the following day, or four trading days). Indeed, the Third Circuit has clarified that it has not adopted any requirement that the price change "instantaneously." *Merck*, 432 F.3d at 269 (considering a stock's behavior over the month following a disclosure).

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[7] The Third Circuit also observed that the defendant company's "share price rose by $3.00 during the four days after the [July 8] disclosure." *Oran*, 226 F.3d at 283. Nevertheless, given the far longer two-month delay actually presented by the facts it confronted, the Third Circuit cannot be considered to have held in *Oran* that any delay here dispels materiality as a matter of law.

Second, Apollo also erroneously relies on *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628 (11th Cir. 2010). Apollo claims that the Eleventh Circuit "h[eld] that a plaintiff's theory of loss causation was 'frivolous' where the stock price did not react following an initial alleged corrective disclosure, but declined 22 days later following a second alleged corrective disclosure." Pet. 16 (quoting *Thompson*, 610 F.3d at 689). Apollo also attributes to the Eleventh Circuit the statement that investors cannot prevail by "'measur[ing] loss causation over twenty days after the market had learned of the alleged fraud.'" *Id.*

The language Apollo quotes, however, does not come from the majority opinion in that case, but from Judge Tjoflat's partial dissent.[8] The *Thompson* majority did not reach any question of loss causation, but instead upheld the district court's dismissal of a securities-fraud complaint for failure to plead scienter and failure to plead secondary liability. The court then remanded for a determination of Rule 11 sanctions rather than itself holding that the claims were frivolous. *See* 610 F.3d at 633-39. Apollo's careless mischaracterization of a dissenting position as a holding offers no support for its petition.

Third, Apollo relies (at 17) on the Second Circuit's opinion in *In re Omnicom Group, Inc. Securities Litigation*, 597 F.3d 501 (2d Cir. 2010), which involved a delay of a year between the disclosure of allegedly concealed information and its effect on the company's

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[8] *See Thompson*, 610 F.3d at 639 (start of Judge Tjoflat's opinion); *id.* at 689 (passage quoted by petitioners). Judge Tjoflat was in dissent because he thought that the court of appeals should itself impose sanctions in the first instance, which was the subject of his loss-causation argument at page 689.

stock price. *See id.* at 511. But Apollo concedes, as it must, that, "[w]ith such a long time lag, the Second Circuit did not have occasion to opine about just how quickly the market must react." Pet. 17. That concession gives up the game: the whole point of Apollo's arguments is the supposed conflict "about just how quickly the market must react."

Apollo nevertheless suggests that the Second Circuit took a position on that issue by stating that the market "'promptly digested'" relevant information. *Omnicom*, 597 F.3d at 511. That phrase, however, was merely a quotation from the complaint in that case, *see id.*, and is not the stuff of precedent. Later panels and district courts in the Second Circuit will not be bound by the language the *Omnicom* investors chose to use. And, even if they somehow were, the word "promptly" would encompass a time period of the day of the fraud-revealing disclosure and the next day, or four trading days, depending on the circumstances.[9]

Fourth, Apollo concedes (at 18-20) that the Ninth Circuit's decision in this case was consistent not only with its own precedent, but also with the precedent of the Fifth and Sixth Circuits. The decisions it cites do indeed support the decision of the Ninth Circuit

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[9] Apollo further argues that *Teamsters Local 445 Freight Division Pension Fund v. Bombardier Inc.*, 546 F.3d 196 (2d Cir. 2008), is relevant to the conflict it seeks to establish. Not so. *Teamsters Local 445* held only that, after hearing expert evidence, a district court acting as factfinder did not clearly err in finding that an investor had failed to prove that the market for a particular security was efficient, based in part on evidence that the security's price had not moved in response to certain information. *See id.* at 207-10. That case did not involve any determination of materiality or loss causation as a matter of law.

– each of them considered a time period between disclosure and price drop substantially longer than the one at issue here, yet held that the period's length did not foreclose recovery as a matter of law. It is worth emphasizing, moreover, that (as Apollo admits, at 20) the Sixth Circuit cited Third Circuit precedent with approval when it held that investors could state a claim involving a price drop that occurs incrementally on separate disclosures over a period of six weeks. *See City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651 (6th Cir. 2005) (quoting *Burlington Coat Factory*, 114 F.3d at 1425). The *Monroe* court thus does not appear to have perceived any relevant conflict.

Ultimately, to the extent there are differences among the circuits on the permissible length of such a period, they concern periods of two to three months. For periods of that length, *Oran* and *Burlington Coat Factory* suggest that the Third Circuit would deny recovery as a matter of law, and *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920 (9th Cir. 2003), and *In re Gilead Sciences Securities Litigation*, 536 F.3d 1049 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1993 (2009), suggest that the Ninth Circuit would leave the question to a jury. This case, however, would not be a suitable vehicle to resolve that question. If the Court affirmed the judgment of the Ninth Circuit, it might well leave open the possibility that the longer periods at issue in petitioners' cited cases were still too long. And the Court would have no basis to reverse the judgment below under the question presented by petitioners without encroaching on the province of the properly instructed jury's findings of fact given the record evidence.

B. There Is No Circuit Conflict Regarding the Treatment of Analyst Reports

Apollo also contends that the circuits are divided on the question whether an investor may prove loss causation by relying on "an analyst['s] . . . report that merely synthesizes and comments upon . . . already-public information." Pet. i. This case does not present that question because Flynn's September 20 reports – the corrective disclosures on which the jury relied in this case – did more than merely synthesize and comment on already-public information: they provided the market with *new* fraud-revealing information, gleaned from Flynn's review of the DOE Report and from her interviews of current and former UOP recruiters, about the long-term significance of the Report, UOP's new compensation plan, and its likely effect on Apollo's prospects. *See supra* p. 8 and *infra* pp. 28-31 (describing the specific new information that Flynn provided to the market on September 20).

In any event, Apollo again overstates its case. None of the cases it cites supports a categorical rule that a corrective disclosure may not arise out of an analysis or commentary that reveals a fraud by using publicly available information. Thus, even if Flynn had relied only on publicly available information in her September 20 report (which she did not), the Ninth Circuit's decision would not implicate any intercircuit conflict.

First, Apollo relies (at 20-22) on *Merck*, in which the Third Circuit considered a company's disclosure that it had adopted a new accounting method. The effect of the new method on the company's reported revenues was possible to derive using a "handful of calculations." 432 F.3d at 270. The calculations

were made by a journalist a few months after the company's initial disclosure. The Third Circuit held that, because the calculations were of "minimal . . . complexity," the journalist's article showing their results was not a corrective disclosure: the information was all previously available to the market. *Id.*

As the district court noted, *see* Pet. App. 9a, the Third Circuit in *Merck* carefully *avoided* announcing a rule that analysis of existing information could never amount to a corrective disclosure. Instead, stating that it did not "wish to reward opaqueness," the court "decline[d] to decide how many mathematical calculations are too many" in order for an analysis to constitute new information. *Merck*, 432 F.3d at 271. As a result, *Merck* cannot be read nearly as broadly as Apollo suggests. Instead, it invites a case-specific determination of whether a particular analysis rises to the requisite level – which does not conflict with the Ninth Circuit's approach here.

Second, the other cases on which Apollo relies (at 20-22) are similarly far afield. In *Teachers' Retirement System of Louisiana v. Hunter*, 477 F.3d 162 (4th Cir. 2007), the Fourth Circuit held that the description in a court filing of certain transactions that a company had already disclosed years ago in filings with the Securities and Exchange Commission was not a corrective disclosure. *See id.* at 187-88. The case did not involve any analysis, synthesis, or commentary, much less adopt a rule that such matters are irrelevant. It therefore cannot be read as creating any conflict with the judgment below.

In *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330 (5th Cir. 2010), the Fifth Circuit stated that a corrective disclosure cannot be merely "[c]onfirmatory information [that]

is already known to the market and, having been previously digested by the market, will not affect the stock price." *Id.* at 337. As with *Teachers*, *Halliburton* did not involve any analysis, synthesis, or commentary: the examples of "confirmatory" statements that the court identified involved comparing a statement *by the defendant* to an earlier statement by the defendant and concluding that it had concealed nothing material. *See id.* at 340, 343 n.50.

In *Omnicom*, the Second Circuit rejected a claim that a newspaper article constituted a corrective disclosure because there was "no ambiguity" that it did not "even purport to reveal some undisclosed fact with regard to . . . specific misrepresentations in the complaint." 597 F.3d at 512. The court further rejected comments from two accounting professors quoted in the article as mere "conclusory suspicions." *Id.* *Omnicom* certainly stands for the proposition that *some* newspaper articles amount to mere "negative characterization[s]" that do not tell the market anything new. *Id.* But, like *Merck*, *Teachers*, and *Halliburton*, it falls far short of the categorical rule that Apollo seeks. And Apollo's erroneous reliance (at 20-22) on Judge Tjoflat's dissent in *Thompson*, 610 F.3d at 690-61, and mischaracterization of that dissent as the law of the Eleventh Circuit, offers no support for its claim of a conflict. *See supra* p. 15.

Third, to bolster its claim of a conflict, Apollo relies heavily on the Ninth Circuit's statement that "the jury could reasonably have found that the UBS reports following various newspaper articles were 'corrective disclosures' providing additional or more authoritative fraud-related information." Pet. App. 2a. Apollo cannot dispute, however, that a report that provides "additional" information is properly a

corrective disclosure. But Apollo's criticism of the Ninth Circuit for "ignor[ing] the critical fact that the Flynn reports did not disclose any additional facts" (Pet. 22 (internal quotation marks and emphasis omitted)) simply asks this Court to second-guess the jury's fact-finding province and offers no basis for this Court to grant certiorari on a question of law.

Apollo contends further that the Ninth Circuit's use of the word "authoritative" reveals a circuit conflict, because (it says) other circuits would not consider whether a statement was made by an "authoritative" source. Pet. 21. As we have shown, Apollo has failed to establish that *any* other circuit follows the categorical rule it seeks. Regardless, the Ninth Circuit's choice of that particular word in an unpublished per curiam opinion would not warrant review – especially because the record shows that the jury here could reasonably have found that Flynn's reports *did* provide the market with information that was "additional" as well as "more authoritative." *See infra* pp. 28-31.

II. APOLLO HAS FAILED TO SHOW ANY CONFLICT WITH *BASIC* OR *DURA*

A. *Basic* Expressly Declined To Adopt the Timing Rule Apollo Seeks

In *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), this Court adopted the fraud-on-the-market theory as a means of proving reliance in class actions. That theory "is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business." *Id.* at 241. As a result, "[m]isleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the

misstatements." *Id.* at 241-42. The theory creates a "rebuttable presumption of reliance" on misleading statements by those who buy stock during a time at which the price has been influenced by material misrepresentations. *Id.* at 242.

In doing so, the *Basic* Court expressly declined "conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price." *Id.* at 248 n.28. It also made clear that it was not attempting to "determine by adjudication what economists and social scientists have debated through the use of sophisticated statistical analysis and the application of economic theory." *Id.* at 246 n.25.

Apollo contends, however, that the principle adopted in *Basic* requires the conclusion that "efficient stock markets generally respond to new information within one day." Pet. 24.[10] To support this contention, Apollo cites nothing in *Basic*, but instead relies on a 1991 article reviewing the economic literature on the efficient-market hypothesis. *See id.* Apollo thus argues that *Basic* adopted a "particular theory of how quickly and completely publicly available information is reflected in market price," *Basic*, 485 U.S. at 248 n.28, while ignoring the Court's statement that it was not doing any such thing.

Indeed, the Ninth Circuit's decision in *America West*, one of the primary targets of Apollo's criticism, contains a careful discussion of *Basic*, including the Court's refusal in footnote 28 to tie the fraud-on-the-market theory to a wholesale adoption of the efficient-

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[10] Here, the market responded immediately to the fraud-revealing disclosure the very day of the disclosure and the next day.

market hypothesis. *See* 320 F.3d at 934 & n.12. It is Apollo's argument, rather than the decision of the court of appeals, that runs counter to *Basic*.

B. *Dura* Did Not Draw the Fact-Opinion Distinction that Apollo Urges

In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), this Court held that the Private Securities Litigation Reform Act of 1995 requires investors to "adequately allege and prove the traditional elements of causation and loss." *Id.* at 346. In reaching that conclusion, the Court quoted a comment to § 548A of the Restatement (Second) of Torts (1977), which "says that a person who 'misrepresents the financial condition of a corporation in order to sell its stock' becomes liable to a relying purchaser 'for the loss' the purchaser sustains 'when the facts . . . become generally known' and 'as a result' share value 'depreciate[s].'" *Dura*, 544 U.S. at 344.

Apollo's claim that *Dura* supports its position relies entirely on *Dura*'s use of the word "facts" in this passage. It argues that, by using that word, the Court established that "[a]nalyses, opinions, and predictions cannot be 'corrective' within the meaning of *Dura*." Pet. 28. This is a remarkable feat of overreading. *Dura* does not discuss the significance of analyses, opinions, and predictions in proving loss causation; none of those issues was contested in that case.

Instead, *Dura*'s only significance for this case is that it establishes the investors' burden to prove by a preponderance of the evidence that Apollo's fraudulent misrepresentations caused their losses. Apollo's contention that *Dura* (which does not even use the phrase "corrective disclosure") augmented those basic requirements with specialized burdens of pleading

and proof is without support in this Court's language or reasoning.

III. THIS CASE IS AN UNSUITABLE VEHICLE FOR CONSIDERING THE QUESTIONS APOLLO SEEKS TO PRESENT

A. This Case Is Fact-Specific and Record-Intensive, and Apollo Has Not Preserved Any Materiality Question

Apollo's failure to show any conflict of authority relevant to the Ninth Circuit's unpublished per curiam decision in this case would alone support a denial of review. Even if this Court were persuaded to develop the law of loss causation, however, this case would be an unsuitable vehicle for doing so. There are at least three reasons why.

First, the judgment of the Ninth Circuit is firmly supported by the ground that the jury here found (after receiving undisputedly correct instructions) that Flynn's September 20 reports were corrective disclosures and that the drop in Apollo's stock price occurred immediately and continued into the next day. If this Court were to grant review, the investors could and would defend the judgment below on that fact-specific basis. If the Court upheld the judgment on that ground, it would have no occasion to reach the broader questions of law that Apollo argues in its petition, and its decision would have little significance except to the parties in this case.

The oral argument in the court of appeals makes it quite clear that the judges perceived this fact-specific ground for affirmance. Chief Judge Kozinski observed that the September 20 reports were "the first time there was a public disclosure about the high turnover

and its effect on the profitability of the company."[11] Judge Gettleman expressed the view that the September 20 reports gave "good reasons for [downgrading Apollo's stock] that I don't think were ever articulated before . . . based on facts that were articulated for the first time in this report."[12] Judge Fletcher stated that "the things that are in the [UBS] Report[s] seriously contradict numerous statements by Apollo" and that "the jury could readily conclude that they are fraud revealing."[13] There is every reason to think that this Court would conclude likewise after hearing argument on the merits and reviewing the full trial record placed before the jury.

Second, the procedural posture of this case makes it an unattractive vehicle for another reason as well. This is an evidentiary challenge to a jury verdict reached after 22 days of trial and thousands of pages of testimony. Reviewing the record in such a case is not a good use of this Court's limited resources.[14] Because relatively few securities-fraud cases ever reach trial, a decision that applies a post-verdict standard is less likely to provide useful guidance for the lower courts than would an otherwise similar case at the pleading or summary judgment stage.

Third, Apollo has limited the questions presented to the issue of *loss causation*. *See* Pet. i. The Third

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[11] Audio Recording of Oral Argument in Policemen's Annuity Benefit Fund of Chicago v. Apollo at 25:36-26:26, No. 08-16971 (9th Cir.), *available at* http://www.ca9.uscourts.gov/datastore/media/2010/03/03/08-16971.wma ("Argument Recording").

[12] *Id.* at 31:37-32:52.

[13] *Id.* at 35:52-36:06.

[14] "Final action" on such a factual review "normally rests with the court of appeals." *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 327-28 (1967).

Circuit cases on which Apollo relies, however, were all cases about *materiality*, not loss causation. *See Burlington Coat Factory*, 114 F.3d at 1425; *Oran*, 226 F.3d at 282; *Merck*, 432 F.3d at 268-71. Indeed, the Third Circuit has resisted any attempt to conflate these two distinct elements of a Rule 10b-5 cause of action, insisting that they are "different concepts." *Merck*, 432 F.3d at 275. Given the central role that these decisions play in Apollo's argument, it only makes sense to consider them (if at all) in a case where the particular argument that persuaded the Third Circuit has actually been preserved.

B. The Recent Grant in *Erica P. John Fund v. Halliburton* Is Irrelevant

Apollo's petition does not mention the pendency before this Court of *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403,[15] in which this Court granted certiorari on January 7, 2011.[16] However, a group of Apollo's *amici* argue that "taking this case in tandem with *Halliburton* would enable this Court to resolve the Circuit splits regarding the law of loss causation at the various stages of a case's life cycle in a comprehensive manner." Brief for Former SEC Commissioners and Law Professors as *Amici Curiae* in Support of Petitioners' Petition at 15.

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[15] The decision of the Fifth Circuit under review in *Halliburton* was reported as *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330, which is discussed *supra* pp. 19-20.

[16] Although Apollo's petition was filed on November 15, 2010, before the Court had granted certiorari in *Halliburton*, the Court had already invited the Solicitor General to file an *amicus* brief in that case on October 4, 2010, so Apollo certainly had notice that the Court was giving *Halliburton* serious consideration when it filed its petition, and could have addressed that petition if relevant.

This contention lacks merit. The questions on which this Court granted certiorari in *Halliburton* have to do with *when* investors must prove loss causation: whether they must "establish loss causation at class certification by a preponderance of admissible evidence," or whether instead a requirement that they do so amounts to "improper[] consider[ation of] the merits of the underlying litigation" at the certification stage. Pet. at i, No. 09-1403. In this case, by contrast, the class has long been certified, and that certification is not now contested. (The parties stipulated that all of the requirements of Rule 23 had been satisfied and stipulated to certification of the class. Dist. Ct. Dkt. Entries 116, 117.) The only question presented here is whether there was sufficient evidence to support the jury's finding for the investors on the merits. Nothing the Court is remotely likely to say in *Halliburton* will shed light on that issue. *See* Br. in Opp. at 18, No. 09-1403 (observing that petitioners in that case have not sought review on the merits of loss causation).

Even if the Court were somehow to reach the merits of the loss-causation issue in *Halliburton*, it would still be highly unlikely that its decision would be relevant to this case. Although petitioners contend that the decision in *Halliburton* conflicts with the decision below here, they do not even allege that the Fifth Circuit's decision is relevant to their first question presented, concerning the timing of corrective disclosures. As for the second question presented, concerning the degree to which analysis or commentary can serve as a corrective disclosure, the Fifth Circuit merely concluded, employing a fact-intensive analysis, that the district court in that case had not abused its discretion based on the evidence before it.

See 597 F.3d at 339-43. Were this Court to review and uphold that decision in *Halliburton*, it would cast no doubt on the Ninth Circuit's determination on the present, very different facts that the jury could reasonably find for plaintiffs here. As a result, the grant of review in *Halliburton* supports neither a grant nor a hold of the present petition.

IV. THE DECISION OF THE NINTH CIRCUIT IS CORRECT

Review is unjustified for one more reason: the Ninth Circuit was correct in reversing the district court's grant of judgment as a matter of law and reinstating the jury's verdict. A court reviewing a jury verdict "must interpret the entire record in the light most favorable" to the party that prevailed at trial, giving it "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might be drawn." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S 585, 604 (1985). There was ample evidence to support the jury's inference that the September 20 analyses contained new, fraud-revealing information that contradicted petitioners' public statements and caused a statistically significant decline in Apollo's stock price.

The September 20 reports were the first to disclose the material changes to the enrollment counselor compensation system and the risks associated with those changes, and to note that then-current and former enrollment counselors told UBS that "turnover has increased since 6/04 intro of new comp plan." ER502. Dr. Feinstein explained to the jury that investors would have been concerned about "impacts on [Apollo's] sales and profits because of management distraction," because "the new incentive plan might not be as incentivizing as the old incentive plan," and

because "employee turnover [could occur] for that very same reason." ER121. He also testified that investors would have interpreted Flynn's reports as disclosing that "[s]omething bad happened as far as the fundamentals and performance of the company at the same time they changed the comp plan." ER180. Dr. Feinstein also tied the new, fraud-revealing information in the UBS reports to the statistically significant decline of Apollo stock on September 20 and 21.

The reports also told the market that the "contents of the DOE's recent program review may cause *more* concerns about [Apollo's] regulatory risk." ER502 (emphasis added).[17] That disclosure directly contradicted Nelson's September 7, 2004 claim that resolution of the DOE review "remove[d] any potential distractions from our management." ER572. And the jury could also infer that Flynn's reports, which traced the link between the DOE Report and Apollo's new compensation plan, informed the market for the first time that Nelson had lied when he stated that the new compensation plan was "unrelated" to the DOE Report and designed simply to make the system more "transparent." ER574.

Apollo sought to contradict this evidence of loss causation, by offering expert testimony that the decline in the stock price on September 20 and 21 was neither related to petitioners' fraud nor related to the publication of Flynn's reports, but was instead the result of a "random" decline. ER264-65. Apollo argued at length that there was "nothing new" in the

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[17] This reference to increased regulatory risk *specific* to Apollo also differs from a news article on September 15 that discussed "regulatory control" of the education "sector" and risks to the sector from increased congressional scrutiny. ER598.

UBS reports and that their contents had already been disclosed to investors. *See, e.g.*, Tr. 4007-14. Having heard this testimony and having weighed its credibility, the jury found for the investors.

Moreover, the district court's decision overturning the jury verdict was erroneous. The court's most obvious error was its reliance on Apollo's argument that "enrollment-counselor turnover actually decreased after the implementation of the new compensation plan." Pet. App. 11a. This argument was based on uncorroborated testimony from Apollo's director of human resources. *See id.* (citing Tr. 2408:1-2411:5); ER217-19. The court was not entitled to credit this testimony after the jury had rejected it. *See Reeves*, 530 U.S. at 151 (explaining that a court deciding a motion for judgment as a matter of law "must disregard all evidence favorable to the moving party that the jury is not required to believe"). Apollo conceded before the court of appeals that the jury "m[ight] be entitled to disbelieve" this testimony because it was offered by an adverse party witness.[18] *Id.* at 143 (jury may conclude that "defendant's explanation is pretextual").

The district court also erred when it ruled that the investors had failed to "link[] this claim to Apollo's misrepresentations." Pet. App. 11a. As just one example, Nelson's September 7 statement – which the jury found to be fraudulent – included statements that the settlement would not "have a material impact

---

[18] Argument Recording at 19:27-19:32. This witness was impeached at trial when her testimony that the changes to Apollo's compensation plan were unrelated to the DOE Report was contradicted by an internal email indicating that Apollo's new compensation plan was designed to avoid "similar findings in the future" by DOE. ER367; *see also* ER352.

on [Apollo's] growth . . . or [it]s financial performance" and that the new compensation scheme was "unrelated" to the dispute with DOE. ER572, ER574. The jury could infer that the effect of the new compensation scheme *would* be material (through its effects on turnover and recruiters' incentives), that it was closely related to Apollo's dispute with DOE, and that these facts disclosed on September 20 were tightly linked to Apollo's misstatements and omissions and petitioners' failure to disclose the contents of the DOE Report, its demand for corrective action, and the material changes to the enrollment counselor compensation plan resulting from that call for corrective action. The same link applies to Flynn's statement that Apollo's enrollment targets were becoming harder to hit, which the jury could infer was a result of Apollo's new compensation plan.

Finally, the district court also erred when it rejected the investors' argument that Flynn's reports "tie[d] future regulatory problems to the DOE report." Pet. App. 11a. The point of this argument was that Flynn had diagnosed the problem as being worse than expected based on previously available information. *See* ER502 ("We . . . think contents of DOE's recent program review may cause more concerns about [Apollo's] regulatory risk."). The jury could reasonably infer that Flynn meant (and the market accepted) that Apollo's stock price before issuance of the September 20 Flynn reports was still overvalued in light of this risk. That reasonable inference provided support for the jury's conclusion that Flynn's research provided new information to the market.

In sum, the court of appeals correctly concluded that the district court had overstepped its bounds and usurped the jury's role by overturning its verdict.

That highly fact-specific determination does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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February 4, 2011

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Master File No. CV 04-2147-PHX-JAT (Lead)
CV 04-2204-PHX-JAT (Consolidated)
CV 04-2334-PHX-JAT (Consolidated)

CLASS ACTION

IN RE APOLLO GROUP INC. SECURITIES LITIGATION

This Document relates to: All Actions.

VERDICT FORM

We, the jury, duly empaneled and sworn in the above-entitled case, upon our oaths, do hereby find as follows:

SECTION 10(b) CLAIM AGAINST APOLLO

1. Did Apollo make an untrue statement of a material fact or omit a material fact necessary under the circumstances to keep the statements that were made from being misleading?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004:

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004:

Yes: X No: ____

If you answered all parts of Question 1 "no," leave Questions 2, 3, and 4 blank and proceed to Question 5. If you answered Question 1 "yes" as to any statement, answer Question 2 as to that statement. Do not answer Question 2 for any statement for which you answered Question 1 "no."

2. For any statement as to which a "yes" answer was given in Question 1, did Apollo act knowingly or recklessly with respect to that misrepresentation or omission?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004.

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004:

Yes: X No: ____

If you answered Question 2 "no" as to all statements left over from Question 1, leave Questions 3 and 4 blank and proceed to Question 5. If you answered Question 2 "yes" as to any statement, answer Question 3 as to that statement. Do not answer Question 3 for any statement for which you answered Question 2 "no."

3. For any statement as to which a "yes" answer was given in Question 2, more specifically, did Apollo act knowingly with respect to that misrepresentation or omission?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004:

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004:

Yes: X No: ____

Proceed to Question 4.

4. For any statement as to which a "yes" answer was given in Question 2, did that misrepresentation or omission cause the plaintiff to suffer damages? (By answering this question in the affirmative, you are finding that Apollo violated the securities laws.)

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004:

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004:

Yes: X No: ____

Proceed to Question 5.

SECTION 10(b) CLAIM AGAINST TODD NELSON

5. Did Todd Nelson make an untrue statement of a material fact or omit a material fact necessary under the circumstances to keep the statements that were made from being misleading?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004:

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004

Yes: X No: ____

If you answered all parts of Question 5 "no," leave Questions 6, 7, and 8 blank and proceed to Question 9. If you answered Question 5 "yes" as to any statement, answer Question 6 as to that statement. Do not answer Question 6 for any statement for which you answered Question 5 "no."

6. For any statement as to which a "yes" answer was given in Question 5, did Todd Nelson act knowingly or recklessly with respect to that misrepresentation or omission?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004:

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004:

Yes: X No: ____

If you answered Question 6 "no" as to all statements left over from Question 5, leave Question 7 and 8 blank and proceed to Question 9. If you answered Question 6 "yes" as to any statement, answer Question 7 as to that statement. Do not answer Question 7 for any statement for which you answered Question 6 "no."

7. For any statement as to which a "yes" answer was given in Question 6, more specifically, did Todd Nelson act knowingly with respect to that misrepresentation or omission?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004:

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004:

Yes: X No: ____

Proceed to Question 8.

8. For any statement as to which a "yes" answer was given in Question 6, did that misrepresentation or omission cause the plaintiff to suffer damages? (By answering this question in the affirmative, you are finding that Todd Nelson violated the securities laws.)

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004:

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004:

Yes: X No: ____

Proceed to Question 9.

SECTION 10(b) CLAIM AGAINST KENDA GONZALES

9. Did Kenda Gonzales make an untrue statement of a material fact or omit a material fact necessary under the circumstances to keep the statements that were made from being misleading?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

If you answered all parts of Question 9 "no," leave Questions 10, 11, and 12 blank and proceed to Question 13. If you answered Question 9 "yes" as to any statement, answer Question 10 as to that statement.

Do not answer Question 10 for any statement for which you answered Question 9 "no."

10. For any statement as to which a "yes" answer was given in Question 9, did Kenda Gonzales act knowingly or recklessly with respect to that misrepresentation or omission?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ___

B) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

If you answered Question 10 "no" as to all statements left over from Question 9, leave Questions 11 and 12 blank and proceed to Question 13. If you answered Question 10 "yes" as to any statement, answer Question 11 as to that statement. Do not answer Question 11 for any statement for which you answered Question 10 "no."

11. For any statement as to which a "yes" answer was given in Question 10, more specifically, did Kenda Gonzales act knowingly with respect to that misrepresentation or omission?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ___

B) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

Proceed to Question 12.

12. For any statement as to which a "yes" answer was given in Question 10, did that misrepresentation or omission cause the plaintiff to suffer damages? (By answering this question in the affirmative, you are finding that Kenda Gonzales violated the securities laws.)

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

Proceed to Question 13.

SECTION 20(a) CLAIM AGAINST TODD NELSON

Answer Question 13 only if you answered Question 4 "yes." If you answered "no" to Question 4 or left it blank, leave Questions 13 and 14 blank and proceed to Question 15.

13. Did Todd Nelson possess, directly or indirectly, the actual power to direct or cause the direction of the management and policies of Apollo?

Yes: X No: ____

Proceed to Question 14.

14. Did the defendants prove by a preponderance of the evidence both that Todd Nelson did not directly or indirectly induce Apollo's violation of the securities laws and that he acted in good faith as that term is defined in the jury instructions?

Yes: ____ No: X

Proceed to Question 15.

Answer Question 15 only if you answered Question 12 "yes." If you answered "no" to Question 12 or left it blank, leave Questions 15 and 16 blank and proceed to Question 17.

15. Did Todd Nelson possess, directly or indirectly, the actual power to direct Kenda Gonzales?

Yes: X No: ____

Proceed to Question 16.

16. Did the defendants prove by a preponderance of the evidence both that Todd Nelson did not directly or indirectly induce Kenda Gonzales's violation of the securities laws and that he acted in good faith as that term is defined in the jury instructions?

Yes: ____ No: X

Proceed to Question 17.

Answer Question 17 only if you answered "yes" to Questions 4, 8, or 12. If you answered "no" to each of these questions or left them blank, sign and return the verdict form without answering any further questions.

17. Specify the total amount of damages per share that the plaintiff suffered as a result of the misrepresentation(s) or omission(s):

$ 5.55 per share

Proceed to Question 18.

18. What is the percentage of responsibility for the plaintiff's loss that you assign to each defendant whom you found in answers to Questions 4, 8, and/or 12 to have violated the securities laws? The total must add up to 100%. In determining the percentage of responsibility for each such defendant, you must consider: (1) the nature of the conduct of each defendant found to have caused or contributed to the loss incurred by the plaintiff; and (2) the nature and extent of the causal relationship between the conduct of each defendant and the damages incurred by the plaintiff.

	Percentage
Apollo	60
Todd Nelson	30
Kenda Gonzales	10
	= 100% Total

Sign and return this form.

9	1/16/08
(Presiding Juror Number)	(Date)

Supreme Court, U.S.
FILED
FEB 16 2011
OFFICE OF THE CLERK

No. 10-649

IN THE

Supreme Court of the United States

APOLLO GROUP, INC., *et al.*,
Petitioners,

v.

POLICEMEN'S ANNUITY AND
BENEFIT FUND OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CORPORATE DISCLOSURE STATEMENT

Petitioner Apollo Group, Inc. has no parent corporation, and no publicly traded corporation owns more than 10% of its stock.

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INTRODUCTION

Plaintiff acknowledges the circuit split on the first question presented, namely how rapidly information must be incorporated into price in a fraud-on-the-market case. It denies the existence of a circuit split on the second question, namely whether the analysis of previously reported facts can qualify as a fraud revealing corrective disclosure under *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). But it has not persuasively refuted the point that four other circuits would have decided that issue as a matter of law against plaintiff.

Plaintiff contends that neither of these questions is presented in this case, because a properly instructed jury found that Kelly Flynn's analyst reports were corrective disclosures. But the point is that no other circuit that has addressed these issues would have allowed a jury to decide that question. Every other circuit would have concluded that Flynn's reports were not corrective disclosures because they did not offer any new, fraud-revealing facts but merely Flynn's analysis of already public facts.

This case provides an excellent vehicle for review because it provides a full record following trial and a simple fact pattern that squarely presents the issues. While plaintiff argues that the gap of "only four trading days" between the newspaper articles and the September 21 price decline makes this case a poor one for line-drawing, in fact precisely the opposite is true. This case would allow the Court to articulate a standard that might be used in close

cases and that would answer important, recurring questions left unanswered by *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

I. THIS CASE SQUARELY PRESENTS THE LEGAL ISSUES

Plaintiff argues that this case does not truly present either of the questions presented "because the jury, dutifully applying the instructions Apollo concedes are correct, actually found a stock price decline that came immediately after a fraud-revealing disclosure and continued into the next day." Opp. 1.

Plaintiff's fundamental premise is incorrect. As a matter of law, the Flynn reports did not satisfy the requirements of *Dura*. The Flynn reports disclosed no new, fraud-*revealing facts*, a point plaintiff implicitly concedes when it states that the reports provided "new, fraud-*related information*." *Id.* Plaintiff's formulation begs the question: is the analysis of already public facts sufficient to comprise a corrective disclosure, or must the disclosure present new, fraud-revealing facts?

According to the opposition's opening paragraph, the "fraud" in this case consisted of Apollo "making misrepresentations about a highly critical report by the U.S. Department of Education ("DOE") that had major implications for Apollo's future prospects." *Id.* However, regardless of how one characterizes Apollo's prior statements, after the widespread disclosure of the contents of the DOE report and its potential consequences for Apollo were reported in the September 14 and 15 newspaper articles, the re-

port's "major implications for Apollo's future prospects" were facts in the public domain. They were also facts that did not cause a statistically significant price drop.

About a week later came the Flynn reports. Plaintiff asserts there are two things about the Flynn reports that constituted "new, fraud-related information" that were not addressed in the newspapers: (i) "the increased risks arising from the DOE Report" and (ii) "the corrective actions demanded by DOE and taken by Apollo in response to the Report." Opp. 1-2.

Neither of these assertions withstands critical analysis. For example, the *Arizona Republic* article of September 14 said that the DOE report cataloged enrollment advisor compensation and sales practices that ranged "from illegal to unethical to aggressive." ER 580. It said "[t]he report *ordered changes*" in the way Apollo compensated and rewarded its enrollment advisors. ER 581 (emphasis added). It also noted that the "company did change its recruiter compensation plan . . . to make it clearer for regulators." *Id.* The *Dallas Morning News* quoted the report's conclusion that Apollo "systematically and intentionally operates in a duplicitous manner so as to avoid the Department's prohibition against incentive compensation while evading detection" and it "flaunts [sic] the department's regulations and prohibition against incentive compensation based on enrollments." ER 594. It stated that Apollo had "institute[d] a new compensation plan in June." ER 595. The *Wall Street Journal* similarly commented upon the change in the compensation system. It re-

ported that "details of the Education Department report are catching some investors by surprise," ER 672, and that the report "raises the question of whether a too-aggressive approach contributed to Apollo's dazzling growth." ER 671. It also suggested that as a result of being "forced to tone down its approach," Apollo would "grow more slowly." *Id.*

These newspaper articles obviously did articulate "increased risks arising from the DOE Report" and Apollo's "corrective actions." What Flynn followed with almost a week later were her "concerns that enrollment growth may be hurt by bad publicity, increasing enrollment advisor turnover, market maturation, and competition." ER 491. None of this could fairly be called a fraud-revealing fact, as opposed to an analyst commenting on previously known facts.

Thus, the Ninth Circuit was plainly wrong to the extent that its holding was premised on the view that the jury could have found that the Flynn reports contained "additional . . . fraud-related information." App. 2a. None of it could fairly be described as "additional." All that was "new" in the Flynn reports was her description of conversations with some past and present enrollment advisors, some of whom said that turnover had increased. ER 502. Flynn did not present this as an objectively true fact—only what "some" people had said—and the only evidence offered at trial was that enrollment advisor turnover actually decreased. ER 502; App. 11a. Moreover, as the district court correctly recognized, Apollo had made no representations about enrollment advisor turnover, so even if

the "some said" statement were objectively true, it should not have qualified as a new fraud-revealing fact under *Dura*. *See* ER 502; App. 11a ("[Plaintiff] did not present any evidence linking this claim to Apollo's misrepresentations").

Yet, as plaintiff points out (Opp. 24-25), the Ninth Circuit focused almost all its attention on this statement that was presented as little more than rumor, which was not even true, and which, in any event, was well within the foreseeable consequences of the previously disclosed facts. Thus, on a very simple record, this case squarely presents the question whether an analyst's assessment of previously disclosed facts can constitute a corrective disclosure. If, as defendants believe, *Dura* does not permit this, then this case also squarely presents the question whether the lag time between the newspaper articles and the price decline was too long.

II. THE CIRCUITS ARE SPLIT REGARDING WHETHER THE ANALYSIS OF PREVIOUSLY DISCLOSED FACTS CAN CONSTITUTE A CORRECTIVE DISCLOSURE

Before the Ninth Circuit's decision in this case, no circuit had ever held that an analyst report that commented upon already public facts could constitute a corrective disclosure. The Ninth Circuit's decision is squarely at odds with that of four other circuits, where the Flynn reports would not be considered corrective disclosures as a matter of law.

Plaintiff argues that neither the Court's decision in *Dura*, nor the decisions of other circuits, actually

requires the disclosure of fraud-revealing *facts*, as opposed to analysis of already public facts. *See* Opp. at 23 ("Apollo's [reliance] on *Dura*'s use of the word 'facts' . . . . is a remarkable feat of over-reading.").

The relevant passage in *Dura* states:

> [T]he Restatement of Torts, in setting forth the judicial consensus, says that a person who "misrepresents the financial condition of a corporation in order to sell its stock" becomes liable to a relying purchaser "for the loss" the purchaser sustains "when the *facts* . . . become generally known" and "as a result" share value "depreciate[s]."

544 U.S. at 344 (quoting Restatement (Second) of Torts § 548A cmt. b (1977)) (emphasis added).

This passage suggests not only that a corrective disclosure must be comprised of "facts," but that it must be comprised of *fraud-revealing* facts, *i.e.*, that "facts . . . become generally known" that remove the inflation in the stock price due to the prior misstatements. As a number of courts have held, under *Dura* a plaintiff must demonstrate the existence of a corrective disclosure that reveals a defendant's prior misrepresentations to have been fraudulent. *See, e.g., Teachers' Ret. Sys. v. Hunter*, 477 F.3d 162, 187 (4th Cir. 2007) ("To allege loss causation in this case, plaintiffs would have to allege that the market reacted to *new facts* disclosed in June 2003 that *revealed* [defendant's] previous representations to have been fraudulent.") (emphasis added); *Archdiocese of*

Milwaukee Supporting Fund, Inc. v. Halliburton, 597 F.3d 330, 338 (5th Cir. 2010) (explaining "the need for the corrective disclosures to *reveal* the actionable truth about prior misstatements") (emphasis added), *cert. granted sub nom. Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 856 (2011) (No. 09-1403).

The Ninth Circuit's standard—with its focus on "fraud-*related information*," App. 2a (emphasis added), rather than fraud-*revealing facts*—dilutes *Dura*'s loss causation requirement. It is largely indistinguishable from the "touches upon" standard of loss causation that *Dura* explicitly rejected. *See* 544 U.S. at 343 ("To 'touch upon' a loss is not to *cause* a loss, and it is the latter that the law requires."). Similarly, to "relate" to a fraud is not to "reveal" a fraud. *See Halliburton*, 597 F.3d at 339 (press release not corrective disclosure because "[a]t most, the release *relates to* prior estimates that asbestos reserve levels were adequate generally, but *it does not correct* a specific prior alleged misstatement") (emphasis added).

Plaintiff's contention that the cases cited in the petition do not reflect a genuine circuit split with the standard applied by the Ninth Circuit in this case is not supportable. *In re Omnicom Group, Inc. Securities Litigation*, 597 F.3d 501, 512 (2d Cir. 2010) stands for the proposition that "a negative characterization of already public information" cannot constitute a corrective disclosure. Plaintiff argues that *Omnicom* is distinguishable because the *Wall Street Journal* article in that case "did not 'even purport to reveal some undisclosed fact with regard to . . . spe-

cific misrepresentations in the complaint.'" Opp. 20. However, the Flynn reports also did not disclose any new fraud-revealing facts. Her analysis consisted of an estimate of future prospects, not a correction of past statements.

Similarly, in *In re Merck & Co. Securities Litigation*, 432 F.3d 261, 269-70 (3d Cir. 2005), the Third Circuit held that a *Wall Street Journal* reporter's analysis of the magnitude of an allegedly improper revenue recognition practice did not constitute a corrective disclosure where the company had previously disclosed the practice. Plaintiff argues that *Merck* "carefully *avoided* announcing a rule that analysis of existing information could never amount to a corrective disclosure" and "invite[d] a case-specific determination of whether a particular analysis rises to the requisite level." Opp. 19. But plaintiff does not say what that "requisite level" means or requires. Regardless, this case stacks up poorly next to *Merck*, where the reporter's analysis was directly related to the alleged omission. Here, Flynn's projections were based on known facts and did not correct anything.

Flynn's reports also would not be considered a corrective disclosure in the Fourth or Fifth Circuits. In *Teachers' Retirement*, the Fourth Circuit held that only the disclosure of "*new facts* . . . that *revealed* . . . previous representations to have been fraudulent" can constitute a corrective disclosure. 477 F.3d at 187 (emphasis added). Plaintiff erroneously asserts that *Teachers' Retirement* "did not involve any analysis, synthesis, or commentary, much less adopt a rule that such matters are irrelevant." Opp. 19. Not so. In that case, the plaintiff's deficient allega-

tions were based on an earlier-filed complaint that merely collected and synthesized facts previously disclosed in SEC filings. The court held that the earlier-filed complaint did not constitute a corrective disclosure because it "disclose[d] nothing new, but merely attribute[d] an improper purpose to the previously disclosed facts." 477 F.3d at 187.

Finally, plaintiff states that *Halliburton* did not involve the analysis of facts by a third party, but a statement by a defendant that was merely "confirmatory" of its prior statement. Opp. 19-20. True, but the Flynn reports could not be considered corrective disclosures under *Halliburton*. *See Halliburton*, 597 F.3d at 338 (discussing the distinction between "disclosures that had a *corrective* effect linked to a specific misrepresentation, as opposed to simply a *negative* effect" and holding that a corrective disclosure cannot be comprised of "confirmatory information").

Regarding the supposedly "more authoritative" nature of Flynn's report, plaintiff makes no serious effort to defend this aspect of the Ninth Circuit's decision. Plaintiff asserts that "the Ninth Circuit's choice of that particular word . . . would not warrant review," Opp. 21, even though "more authoritative" was obviously intended to convey the idea that it is permissible to premise a corrective disclosure on the prominence of the source as opposed to the newness of the facts. Plaintiff does not dispute that this view clashes with the efficient market theory—which posits that all publicly available information is reflected in a stock's price, regardless of the source, Pet. at 21-

22—and is flatly at odds with the views of the other circuits.

III. THE CIRCUITS ARE SPLIT REGARDING HOW QUICKLY INFORMATION IS INCORPORATED INTO PRICE

Plaintiff argues that there is no "relevant" circuit split regarding the timeframe in which information is impounded into price because the delay in this case was "only four trading days." Opp. 12-13. According to plaintiff, the cases cited by defendants are inapposite because they involved longer delays of two months or more. Opp. 14.

There are two responses to this: First, the cases cited by defendants use the language of "immediacy" because that accurately describes how the efficient market theory works. If there is a theoretical justification for the law adopting a more nebulous standard, plaintiff has not made it. Second, plaintiff's "four trading days" argument actually makes this an excellent case for review because it requires the Court to address the question left open by *Basic* regarding how quickly an efficient market incorporates information into price. There may have been good reasons to leave that question open 23 years ago, but the split in the circuits that has since developed demonstrates a profound lack of agreement regarding what the Court was intending when it incorporated the efficient market theory into the law.

Regarding the cases, the legal standard espoused by the Third Circuit is that the price reaction must be "immediate[]." *Oran v. Stafford*, 226 F.3d 275,

282 (3d Cir. 2000). There is no reason to believe that the Third Circuit used the word "immediate" to mean anything other than what it means in ordinary parlance. This is particularly true where the economic literature uses the same term. *See* Pet. 24.

Similarly unavailing is plaintiff's attempt to distinguish the Second Circuit's decision in *Omnicom* by saying that its statement that information is "promptly digested" in efficient markets is "not the stuff of precedent." Opp. 16. *Omnicom* uses that phrase not once, but three times, and it leaves no doubt about its validity as precedent: "appellant must concede that the numerous public reports on the Seneca transaction were 'promptly digested' by the market and 'reflected . . . in Omnicom's stock price' in 2001 while seeking to recover for a stock price decline a year later in 2002." 597 F.3d at 511.[1]

The First Circuit has also adopted a definition of efficiency that is aligned with that of the Second and Third Circuits. *See In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 14 (1st Cir. 2005) (definition of efficiency requires "prices [to] respond so quickly to new information that it is impossible for traders to make trading profits on the basis of that information"). *Polymedica* involved the vacating of a class certification order and its reasoning is quite similar to the Second Circuit's decision in *Teamsters Local 445 Freight Division Pension Fund v. Bombardier,*

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[1] Plaintiff is correct that defendants erroneously cited the Eleventh Circuit's decision in *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628 (11th Cir. 2010), as supporting a circuit split, and we regret that error.

Inc., 546 F.3d 196, 207-10 (2d Cir. 2008) (discussed in the petition (Pet. 17-18)).

Plaintiff disputes the relevancy of *Bombardier*, because class certification involves the application of the presumption of reliance, as opposed to loss causation. Opp. 16 n.9. Indeed, plaintiff takes it a step further and argues that not even the Third Circuit's decisions in *Oran* and *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410 (3d Cir. 1997), are relevant because they are "about *materiality*, not loss causation." Opp. 26.

There is no theoretical justification for applying two or three different legal standards for market efficiency when it comes to the elements of materiality, loss causation, and the presumption of reliance. It defies logic that these three legal elements partake of the efficient market theory differently. In plaintiff's world, each circuit is entitled to develop its own rules regarding the speed with which an efficient market incorporates information into price, and each circuit may develop a different speed limit for the purposes of loss causation, materiality, and reliance. The Ninth Circuit recently did exactly that in *Miller v. Thane International, Inc.*, 615 F.3d 1095, 1103 (9th Cir. 2010), where it held that a "plaintiff establishes fraud on the market by demonstrating that a security is actively traded in an 'efficient market,' in which prices immediately reflect all publicly available information," but "an *immediate* response is not required for loss causation."

This asymmetrical approach to the legal application of the fraud-on-the-market theory is without

theoretical justification and is profoundly unfair to defendants. Its inconsistent application across the legal spectrum highlights the confused state of the law and the need for this Court to clarify the questions left unanswered in *Basic* and *Dura*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

APOLLO GROUP, INC., *et al.*,
Petitioners,

v.

POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Association of Private Sector Colleges and Universities ("APSCU") is a non-profit national trade association representing over 1,400 accredited private sector colleges and universities throughout the United States. It serves as an advocate for, and a source of research and information on, private sector postsecondary education.

A private sector college or university ("PSCU") is a postsecondary education institution that provides a variety of professional or technical career-focused educational programs that lead to doctoral and master's degrees, bachelor's degrees, associate's degrees, or less-than-two year certificates or diplomas. PSCUs in the United States collectively educate more than 3.2 million students annually according to 2008-2009 Department of Education data.[2] PSCUs provide educational programs in over 200 occupational fields, including accounting, allied healthcare, automotive technology, business administration, commercial art, criminal justice, law enforcement administration, culinary and hos-

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[1] No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than APSCU, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this amicus curiae brief have been filed with the Court.

[2] Department of Education, National Center for Education Statistics, Institute of Education Services, *Postsecondary Institutions and Price of Attendance in the United States: Fall 2009, Degrees and Other Awards Conferred: 2008-09, and 12-Month Enrollment: 2008-09, First Look*, tbl. 10, p. 18 (Aug. 2010), *available at* http://nces.ed.gov/pubs2010/2010161.pdf.

pitality management, emergency medical technology, information technology, interior design, legal administration, network administration, nursing, digital media, visual and performing arts, and other occupations.

APSCU has a diverse membership of educational institutions that are owned and operated by private individuals or families, private investors, and publicly traded corporations. Within APSCU's membership there are 10 publicly traded companies that educate hundreds of thousands of students at more than 650 campuses in 45 states.

Compared to traditional institutions of higher education, enrollment in the private postsecondary education sector has experienced rapid growth over the past decade.[3] The 10 publicly traded PSCUs within APSCU's membership have been a strong part of that rapid growth, reflecting increased demand in the United States for training for occupations requiring at least one year of postsecondary education and the flexible and innovative educational programs offered by PSCUs to students who are primarily working adults.

Strong growth in private sector postsecondary education has been accompanied recently by increased regulatory activity at the Department of Education ("ED") and heightened scrutiny in Congress regarding recruitment and admissions practices at PSCUs. This heightened attention by policymakers has correlated

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[3] Department of Education, National Center for Education Statistics, Institute of Education Sciences, *The Conditions of Education 2010*, Indicator 7: Undergraduate Enrollment, pp. 36-37 (May 2010), *available at* http://nces.ed.gov/programs/coe/2010/pdf/7_2010.pdf.

with an increase in securities fraud class action lawsuits against postsecondary educational institutions.

In this case, Petitioner Apollo Group, Inc. seeks review of a decision by the Court of Appeals for the Ninth Circuit applying an extremely liberal standard for permitting class action plaintiffs to demonstrate a critical element of a securities fraud claim—"loss causation." This liberal standard permits and encourages frivolous securities fraud cases to be filed and pursued. The threat from such suits is particularly severe in the heavily-regulated private education sector.

Rejecting the Court of Appeals' approach and adopting a more rational loss causation standard would significantly reduce the uncertainty facing publicly traded PSCUs and allow those institutions to focus their resources on their mission of educating students. APSCU and its publicly traded member institutions, therefore, have a strong interest in this Court's resolution of this case and urge the Court to grant Apollo's petition.

SUMMARY OF ARGUMENT

The Court has an opportunity in this case to provide important guidance regarding the standard for proving "loss causation" in private securities fraud class actions. Frivolous securities fraud cases are a significant problem generally and are particularly burdensome for highly regulated PSCUs. The liberal standard for proving loss causation applied by the Court of Appeals in this case not only allows but also encourages the pursuit of highly tenuous securities fraud claims. The Court should grant the petition and reverse the Court of Appeals.

ARGUMENT

I. ADOPTION OF A RATIONAL AND PREDICTABLE STANDARD FOR PROVING LOSS CAUSATION IS CRITICAL FOR PUBLICLY TRADED COMPANIES THAT OPERATE IN A HIGHLY REGULATED ENVIRONMENT

The proliferation of baseless securities fraud suits is a well-recognized problem. In passing the Private Litigation Securities Litigation Reform Act, Congress sought to reduce the "abusive practices committed in private securities litigation" including "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer." H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 730. The problem of frivolous securities class actions, however, persists. As this Court recently recognized, securities fraud litigation continues to "'present[] a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.'" *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 80 (2006) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975)).

The problem is particularly acute for publicly traded PSCUs, which are subject to extensive federal and state oversight that often serves as fodder for class action attorneys. Institutions of higher education, including APSCU member institutions, are subject to substantial oversight and regulation on three different levels: (1) federal legislation and regulations promulgated by federal agencies, including extensive regulations governing eligibility for federal student financial

aid, *see* 34 C.F.R. §§ 600 *et seq.*;[4] (2) state laws and regulations; and (3) accreditation by national or regional accreditation bodies. Collectively, this three-part system of oversight and regulation is known as the "Triad."

This federal and state oversight takes many forms. Schools are subject to program reviews by ED, investigations by congressional committees, and inquiries by states and state agencies. In the past year, there has been a push for even more regulation and oversight of PSCUs. For example, in August 2010, the United States General Accounting Office ("GAO") released a report citing allegations of recruitment and admissions misconduct by a number of PSCUs.[5] Private sector higher education has also been the subject of a number of congressional oversight hearings and two pending investigations by state attorneys general. Shortly after the August 2010 GAO Report was released, ED also announced plans to request and dedicate considerable additional federal resources to oversight and enforcement of financial aid regulations, including (among other things) adding 60 additional staff, conducting 50

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[4] PSCUs that enroll veterans are also subject to regulations promulgated by the Department of Veterans Affairs. *See, e.g.*, 38 U.S.C. § 3452(f); *id.* § 3490; *id.* § 3492.

[5] GAO, *For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices* (Aug. 2010), *available at* http://www.gao.gov/new.items/d10948t.pdf.

percent more program reviews, and appointing a Chief Customer Experience Officer.[6]

APSCU fully supports the application and enforcement of all current laws and regulations by the federal government and the states. It has been the sector's experience in the past, however, that when regulators and policymakers focus attention on PSCUs, increased litigation by plaintiffs is sure to follow, often based on dubious merits. This has proven to be the case this year as well. Since the August 2010 release of the GAO report, there have been at least 14 securities fraud actions filed against publicly traded PSCUs in the United States.[7] Although GAO later revised the report to be significantly more favorable to the PSCUs inves-

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[6] Letter from Arne Duncan, Sec'y of Educ., to Senators Tom Harkin and Michael Enzi (Aug. 13, 2010), *available at* http://www2.ed.gov/policy/highered/guid/secletter/100817.html.

[7] *See Police Pension Fund of Peoria* v. *Capella Educ. Co.*, 10-cv-04474 (D. Minn. Nov. 5, 2010); *Operating Eng'rs Constr. Indus. & Misc. Pension Fund* v. *ITT Educ. Servs., Inc.*, 10-cv-08323 (S.D.N.Y. Nov. 3, 2010); *Boca Raton Firefighters' & Police Pension Fund* v. *DeVry Inc.*, 10-cv-07031 (N.D. Ill. Nov. 1, 2010); *Plumbers Local #200 Pension Fund* v. *Washington Post Co.*, 10-cv-01835 (D.D.C. Oct. 28, 2010); *Parikh* v. *Education Mgmt. Corp.*, 10-cv-11723 (D. Mass. Oct. 8, 2010); *Kinnett* v. *Strayer Educ., Inc.*, 10-cv-02317 (M.D. Fla. Oct. 15, 2010); *Roth* v. *Apollo Group, Inc.*, 10-cv-02121 (D. Ariz. Oct. 4, 2010); *Fitch* v. *Apollo Group, Inc.*, 10-cv-02044 (D. Ariz. Sept. 23, 2010); *Lyathaud* v. *Lincoln Educ. Servs. Corp.*, 10-cv-04926 (D.N.J. Sept. 19, 2010); *Karam* v. *Corinthian Colls., Inc.*, 10-cv-06523 (C.D. Cal. Aug. 31, 2010); *Gaer* v. *Apollo Group, Inc.*, 10-cv-01735 (D. Ariz. Aug. 13, 2010); *Moreaux* v. *Lincoln Educ. Servs. Corp.*, 10-cv-04160 (D.N.J. Aug. 13, 2010); *Gaer* v. *American Pub. Educ., Inc.*, 10-cv-00081 (N.D. W. Va. Aug. 12, 2010); *Gaer* v. *Education Mgmt. Corp.*, 10-cv-01061 (W.D. Pa. Aug. 11, 2010).

tigated,[8] the damage—in the form of lawsuits and reputational injury—was already done.[9]

Shareholder actions against private sector institutions are often based on data or requirements mandated by ED regulations. In this case, for example, the suit against Apollo centers on a preliminary agency report concerning an alleged violation of ED's incentive compensation regulations. The potential for suits of this kind is only increasing. On October 29, 2010, ED published a Final Rule enacting major amendments intended to strengthen and improve ED's administration of federal financial aid eligibility rules for institutions of higher education under the Higher Education Act of 1965.[10] One of the changes made by these amendments, for example, was to eliminate certain "safe harbors" providing exceptions to the general prohibition on providing incentive compensation. The agency is also expected to issue a final rule in early 2011 that has the potential to severely restrict financial aid eligibility for postsecondary education programs that do not meet elaborate new student debt limitations that ED believes are necessary to ensure that institu-

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[8] The GAO re-released an amended version of its August 2010 report on November 30, 2010. *See* GAO, *For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices* (Aug. 2010), *available at* http://www.gao.gov/new.items/d10948t.pdf.

[9] The problem is further exacerbated by inaccurate reports by financial analysts highly critical of the sector—some of whom have a financial stake through short positions on publicly traded PSCUs.

[10] *See* 75 Fed. Reg. 66,832 (Oct. 29, 2010).

tions prepare students for "gainful employment." *See* 75 Fed. Reg. 43,616 (July 26, 2010).

To the extent these regulations take effect as scheduled, it is nearly certain that they will result in increased litigation against private sector institutions based on the enhanced and, in some instances, opaque and confusing new federal financial aid eligibility requirements they impose. In this environment, it is particularly important that the standards governing securities class action lawsuits prevent the filing and pursuit of meritless claims.

II. The Ninth Circuit's Unguided Approach To Loss Causation Encourages Frivolous Suits And Should Be Rejected

The extremely liberal "loss causation" standard applied by the Court of Appeals in this case encourages, rather than prevents, meritless securities fraud lawsuits. As Petitioners have explained, the Court of Appeals in this case held that securities fraud class action plaintiffs can prove loss causation (1) even if a significant period of time elapses between the alleged corrective disclosure of the truth withheld by the defendant and the allegedly resulting drop in stock price, and (2) based on financial analyst reports that provide no new factual information. This open-ended and illogical approach invites frivolous suits and should be rejected.

As a matter of logic, an efficient market should process publicly available information immediately after the information's disclosure. *See* Pet. 24. The standard applied by the Court of Appeals, however, inexplicably assumes that an efficient market can take days, weeks, or even months to process such information. *See* Pet. App. 2a (relying on *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1057-1058 (9th Cir. 2008) (reject-

ing a "bright-line rule requiring an immediate market reaction" and finding that a corrective disclosure could have caused a drop in stock price 82 days later (internal quotations marks omitted))).

The Ninth Circuit's approach to the type of information that can constitute a corrective disclosure in an efficient market is similarly flawed. An efficient market should not be swayed by restatements of previously disclosed facts. A material corrective disclosure will cause a stock's price to decline, while an immaterial disclosure will not. The Ninth Circuit appears to be alone in permitting class action plaintiffs to prove causation by pointing to a drop in stock price correlated with the mere restatement of previously known information. *See* Pet. 20-21.

Loss causation is a critical element of a securities fraud claim that limits recovery to "losses that misrepresentations actually cause." *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005). By permitting plaintiffs to prove loss causation without showing a drop in stock price immediately following the alleged corrective disclosure, and by allowing plaintiffs to rely on mere restatements of previously disclosed information, the Court of Appeals would all but jettison this important device for screening legitimate claims from frivolous ones. Allowing the Court of Appeals' approach to stand would thus increase legal uncertainty for publicly traded companies, increase the incentive for forum shopping by plaintiffs, and increase the chance that defendants needlessly will be forced to settle frivolous claims against them.

In the highly regulated and highly scrutinized environment in which PSCUs operate, the loss causation standard applied by the Court of Appeals unduly bur-

dens PSCUs with frivolous suits and significantly erodes the clarity and predictability on which the publicly traded members of APSCU depend to provide postsecondary education to millions of students.

CONCLUSION

For the foregoing reasons and as set forth in Apollo's petition, the Court should grant certiorari and reject the Ninth Circuit's approach to loss causation.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR FORMER SEC COMMISSIONERS AND LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS' PETITION

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IN THE

Supreme Court of the United States

APOLLO GROUP, INC., *ET AL.*,

Petitioners,

v.

POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR FORMER SEC COMMISSIONERS AND LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS' PETITION

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former Commissioners of the Securities and Exchange Commission (SEC) and professors of law and finance whose fields of expertise include securities regulation, class-action practice, and law and economics. *Amici* have devoted substantial parts of their professional careers to

[1] Pursuant to Rule 37.6, this brief was not authored in whole or in part by counsel for a party. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for both parties received timely notice of *amici*'s intent to file this brief. Letters from the parties consenting to the filing of this brief are on file with the Court.

implementing, drafting, and studying the federal securities laws, including how those laws should be interpreted to ensure protection of investors and promotion of efficiency, competition, and capital formation.

This brief reflects the consensus view of the *amici*, all of whom believe that this Court should grant Apollo's petition for certiorari. Each individual *amicus* may not, however, endorse every argument presented herein. The former Commissioners and professors joining this brief as *amici*, listed alphabetically, are:

The Honorable Charles C. Cox, who served as a Commissioner of the SEC from 1983 through 1989, Acting Chairman of the SEC during 1987, and as Chief Economist of the SEC from 1982 through 1983;

The Honorable Joseph A. Grundfest, who served as a Commissioner of the SEC from 1985 through 1990 and who is the William A. Franke Professor of Law and Business at Stanford Law School, Senior Faculty of the Rock Center on Corporate Governance at Stanford University;

The Honorable Roberta S. Karmel, who served as a Commissioner of the SEC from 1977 through 1980, and who is the Centennial Professor of Law at Brooklyn Law School.

Simon M. Lorne, who served as General Counsel of the SEC from 1993 to 1996 and who is an adjunct professor at the NYU School of Law and NYU's Stern School of Business; and

Professor Kenneth E. Scott, who is the Ralph M. Parsons Professor of Law and Business emeritus at Stanford Law School.

INTRODUCTION AND SUMMARY OF ARGUMENT

Unlike traditional fraud lawsuits, modern securities class actions under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder depend on a series of presumptions and methods of proof that substitute for the traditional forms of evidence such as investor testimony. Like the implied § 10(b) right of action itself, these presumptions are mostly judge-made; for example, in almost every § 10(b) class action, investor reliance on the defendant's misrepresentations is presumed rather than proven, on the theory that the impersonal market swiftly assimilates all new material information and incorporates it in securities prices. This presumption was enshrined in § 10(b) by this Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), which formally adopted the "fraud on the market" theory of investor reliance.

The underlying theory of swift market incorporation of new, material information, known as the efficient capital markets hypothesis, is well-established in academic literature, and that literature – along with "common sense and probability," judicial precedent and the history of the Securities Exchange Act – underlay this Court's decision to adopt it as a legal rule of evidence. *Basic*, 485 U.S. at 246-47 & nn. 24-26. Its acceptance gave plaintiffs a powerful weapon: by pleading and proving that a market is efficient, they can recover damages without actual proof that anyone, anywhere actually relied on an alleged misrepresentation, based on the theory that the unsleeping eye of the market took notice and incorporated the misrepresentation into its prices. The Circuits have required plaintiffs, before invoking this weapon, to plead and prove that

the market bears the hallmarks of efficiency under the "semi-strong" version of the efficient capital markets hypothesis, meaning proof that the market for a security actually does react to new, material information in the way the theory posits – immediately and consistently.

But while the efficient capital markets hypothesis is the *sine qua non* of investor class actions in establishing that market prices reacted to *false* information, the Circuits have split over how to apply the same theory to market responses to *true* information for purposes of proving two other elements of a § 10(b) claim – loss causation and materiality. Some Circuits hold that when the market fails to react to a subsequent "corrective" disclosure of the truth, that is proof that the market didn't consider those facts material in the first place. Some Circuits hold that if the market fails to react to an initial corrective disclosure of facts, the plaintiffs cannot prove that such disclosures were the cause of their losses, even if those losses followed some later disclosure (a newspaper article, analyst report or other secondary source) repackaging and commenting on the same facts.

The Ninth Circuit, in this case, took the opposite view. The market for the defendant company's stock – whose efficiency was presumed for purposes of reliance – did not show a statistically significant response to initial reports of an adverse report by the Department of Education that undermined the defendants' prior statements, nor to subsequent extensive press reports detailing the troublesome findings of that report – only to two later analyst reports rehashing those facts and opining about them. Yet, the Ninth Circuit found it legally permissible for plaintiffs to establish loss causation

from the market's delayed reaction to the analyst reports, *and* to recover damages from the days when the original facts were disclosed. Under the efficient capital markets hypothesis as it is applied to the reliance inquiry, and as it is applied in other Circuits to materiality and loss causation, this is not a permissible result.

The split illustrated by the Ninth Circuit's ruling – between Circuits as well as between elements of the same claim – creates an unpredictable landscape for securities class actions and encourages forum shopping in search of courts that will judicially expand the boundaries of recoverable losses. That landscape has led to repeated petitions to this Court to clarify the different ways in which the hypothesis is used, and disregarded, at different stages and to different elements of a § 10(b) case. If the efficient capital markets hypothesis is to form the basis of a lawsuit, it must be applied consistently to all elements of the claim. See *Basic*, 485 U.S. at 231 (noting that this Court has defined a standard of materiality under the securities law). This Court should put an end to the confusion by granting the petition for a writ of certiorari and clarifying that any lawsuit using the efficient capital markets hypothesis to establish the reliance element of the claim must apply the same theory – including its fundamental premise that the stock price immediately reacts to new information – to establish the materiality and loss causation elements as well.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE MULTIPLE ONGOING CIRCUIT SPLITS REGARDING THE EFFICIENT CAPITAL MARKETS HYPOTHESIS

A. The Efficient Capital Markets Hypothesis Underlies All Fraud on the Market Cases

The efficient capital markets hypothesis states that in "an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business." *Basic*, 485 U.S. at 241. "[A]ll publicly available information is embedded in stock prices." Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 Bus. Law. 1, 5 (1982-83) (cited in *Basic*). New information important to reasonable investors (in effect, the market) is immediately incorporated into stock prices. *Basic*, 485 U.S. at 244. The "semi-strong" version of the hypothesis recognizes that "the collective action of a sufficient number of market participants buying or selling the stock causes a very rapid, if not virtually instantaneous, adjustment in price." Fischel, *supra*, at 10 n.30 (internal quotation marks omitted).[2]

Because the market immediately incorporates new information into stock prices, this Court in *Basic*

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[2] This is in contrast to the "strong" version of the efficient capital markets theory, which posits that the market's reaction is correct, in addition to being immediate, and the "weak" version – inconsistent with *Basic* but effectively the theory adopted here by the Ninth Circuit – which does not presuppose that new information is immediately and fully reflected in market prices.

compared the market to "the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price." *Basic*, 485 U.S. at 244. That goes equally for both true and false information: "the market price of stocks reflects all available public information — and hence necessarily, any material misrepresentations as well." Fischel, *supra*, at 10 n.30. Thus, if there have been material misrepresentations, the market price will be fraudulently inflated, and can be legally presumed as such without further proof: "Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. . . . [a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Basic*, 485 U.S. at 241-42, 247 (internal quotation marks omitted). This Court concluded that "[b]ecause most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action." *Id.* at 247.

In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), this Court adopted a rule for loss causation in Rule 10b-5 actions that is consistent with the efficient capital markets hypothesis. The Court held that, in order to satisfy the element of loss causation, a plaintiff must allege that the "share price fell significantly after the truth became known." *Id.* at 347. This requirement for loss causation complements the presumption of reliance. In *Basic*, the Court could presume reliance on the theory that all information, even misstatements, will be immediately incorporated in the price of the stock; in *Dura*, the Court required plaintiffs to demonstrate

loss causation with a decline in price following a corrective disclosure, because the truth – like the misrepresentation – will be immediately incorporated into the price of the stock.

Unfortunately, not all Circuits have read *Dura* and *Basic* as applying the same rule.

B. The Circuits Are Split

The Circuits are in direct conflict as to what constitutes a corrective disclosure, and whether a subsequent republication of a prior disclosure can be actionable. On the one end of the spectrum, as clearly illustrated by the facts of this case, the Ninth Circuit holds that the market can be deemed to have reacted to a "corrective disclosure" even when reacting to facts that were disclosed days, weeks, or even months earlier. Other circuits, such as the Fifth Circuit, have endorsed a similar approach, albeit only in some procedural settings. On the other end of the spectrum, the Second, Third, and Fourth Circuits have held that there must be an immediate decline in the market price following a disclosure of new facts to establish a market reaction probative of loss causation or materiality. The division cannot be reconciled without this Court's intervention.

Apollo initially disclosed the existence of the DOE report and its settlement with the DOE on September 7, 2004. On September 14-15, the media extensively covered the contents of the DOE report and Apollo's practices. Apollo's stock price did not react: there was no statistically significant reaction.[3] Two weeks

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[3] In a typical § 10(b) action, expert econometric testimony premised upon the efficient capital markets hypothesis is used to establish the timing and duration of price inflation for purposes of establishing reliance loss causation and damages. Courts have generally recognized the standard applied by

after Apollo's initial disclosures, however, a securities analyst, Kelly Flynn, issued two reports republishing the facts in the DOE report, offering her opinions about the DOE reported facts and other unrelated negative information and downgrading the stock. Immediately following the issuance of the Flynn reports, Apollo's stock price suffered a statistically significant decline. Notwithstanding the fact that the Flynn reports merely incorporated and synthesized the information that had been disclosed by Apollo two weeks earlier, the Ninth Circuit treated the Flynn reports as permissible corrective disclosures. This

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econometric experts under which a stock price reaction is only legally significant if it is statistically significant after excluding the movement of market-wide indices. *See, e.g., In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 505 (2d Cir. 2010); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 230 (5th Cir. 2009) (per curiam). Such standards are necessary to exclude the possibility that prices moved due to random chance. *See Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977) (pegging level of statistical significance at "greater than two or three standard deviations"); *Ottaviani v. State Univ. of N.Y. at New Paltz*, 875 F.2d 365, 371 (2d Cir. 1989) ("two standard deviations corresponds approximately to a one in twenty, or five percent, chance that a disparity is merely a random deviation from the norm, and most social scientists accept two standard deviations as a threshold level of 'statistical significance'"); *Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 197 (5th Cir. 1996) (excluding expert testimony that failed to meet standards of statistical significance); *EEOC v. Ethan Allen, Inc.*, 259 F. Supp. 2d 625, 635 (N.D. Ohio 2003) (excluding expert testimony that used a 68% confidence level, "only slightly higher than the predicted results of tossing a coin."). Despite this consensus, the Ninth Circuit in this case permitted damages to be recovered even for days on which no statistically significant price reaction could be proven.

view is irreconcilable with the efficient capital markets hypothesis.[4]

The Third Circuit, in a line of cases beginning with *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1416, 1425 (3d Cir. 1997) (Alito, J.), has taken a more orthodox view of how efficient markets operate. The defendant company in *Burlington* disclosed the poor sales figures that had been claimed to constitute a disclosure of the fraud on July 29, 1994, to no market reaction; the stock did not plunge sharply until the company's year-end revenues and earnings were released in a press release on September 20, 1994. The court explained that, "[b]ecause the market for BCF stock was 'efficient' and because the July 29 disclosure had no effect on BCF's price, it follows that the information disclosed on September 20 was immaterial as a matter of law." *Id.* at 1425. In a later case, then-Judge Alito elaborated that "when a stock is traded in an efficient market, the materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price of the firm's stock." *Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) (Alito, J.).[5]

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[4] The Fifth Circuit, while taking a more stringent position at later stages of the litigation, likewise permits a delayed-reaction theory of loss causation at the pleading stage. *See Lormand v. US Unwired, Inc.*, 565 F.3d 228, 266 n.33 (5th Cir. 2009).

[5] Other circuits that follow this approach include the Second Circuit, *see, e.g.*, *In re Omnicom Grp, Inc. Sec. Litig.*, 597 F.3d 501 (2d Cir. 2010) (noting that plaintiff must prove that the corrective disclosure was "promptly digested" by the market); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 207 (2d Cir. 2008) (noting that "[e]vidence that unexpected corporate events or financial releases cause an immediate response in the price of a security" is the most important factor in determining whether the stock trades in an

In this case, the Ninth Circuit concluded that the Flynn reports were "corrective disclosures" because they could have provided "additional or more authoritative fraud-related information," even though, notably, they did not contain any new facts not previously disclosed but only offered the third party analyst's opinions. In so doing, the Ninth Circuit rejected the district court's conclusion that the Flynn reports could not be treated as a corrective disclosure because, in an efficient market, the market is presumed to have already incorporated the facts contained in the initial disclosure.

In contrast, in other Circuits, this type of republication or amplification of previously disclosed facts cannot constitute a corrective disclosure. For example, in *Teachers' Retirement System of Louisiana v. Hunter*, the Fourth Circuit found that the republication of previously disclosed facts in a complaint (which was followed by a stock price decline) could not have caused the stock price to decline. 477 F.3d 162, 187 (4th Cir. 2007); see also *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 512 (2d Cir. 2010) (finding that a subsequent negative characterization of previously known facts cannot constitute a corrective disclosure).

As these cases demonstrate, the Circuits have adopted diametric positions on what constitutes a

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efficient market), and the First Circuit. *See In re Polymedica Corp. Sec. Litig.*, 432 F.3d 1, 14 (1st Cir. 2005) (a "market price 'fully reflects' all publicly available information when prices respond so quickly to new information that it is impossible for traders to make trading profits on the basis of that information. . . . Where the market reacts slowly to new information, it is less likely that misinformation was reflected in market price and therefore relied upon.") (internal quotation marks omitted), *see also* Petition at 15-18.

corrective disclosure and how quickly the market must react to bad news to satisfy loss causation under *Dura*, and in so doing have failed to apply a consistent theory of market behavior. This conflict warrants further clarity from this Court. Absent further guidance, the circuits are left to create a body of diverging case law that offends the notions of justice and fundamental fairness.

Beyond the fundamental conflict discussed above, this Court should also provide clear guidance to the lower courts on the application of *Dura* to efficient markets because it is an issue that is often raised at various stages of a litigation, and consistent application at the different stages of the litigation is equally important. In the case at hand, the issue arose at the proof stage, following the completion of a trial. However, loss causation is often addressed also at the pleading and class certification stage. See, *e.g.*, *Dura*, 544 U.S. at 348 (finding that plaintiffs' complaint allegations insufficient to plead loss causation); *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330, 344 (5th Cir. 2010) (affirming district court's denial of class certification on the ground that plaintiff failed to meet the requirements for proving loss causation at the class certification stage).

Amici believe that the efficient capital markets hypothesis should be consistently applied to federal securities fraud claims. Courts that allow such claims to proceed despite a delay of days, weeks or months between the revelation of the truth and the (allegedly) corresponding stock price adjustment, even if that later adjustment corresponds to release of an analyst report that repackages the information, fundamentally ignore the efficient capital markets hypothesis as applied in *Basic* and *Dura*. When truth

is introduced into the market, the inflation in the stock price will be immediately removed. Deflation resulting from the truth is immediate just as the inflation resulting from the misstatement is immediate. Fischel, *supra*, at 10 n.30. An investor who purchased stock after the truth correcting a prior misrepresentation was revealed would not be able to claim that he was defrauded by the prior misrepresentation. Rather, once the truth has been revealed, the truth necessarily is incorporated into the stock price. At that point, the stock is no longer artificially inflated as a result of the prior misrepresentation. Thus, even if the stock price declines after a later analyst report repackages the information, that stock price decline cannot be due to artificial inflation being removed from the stock's price. Otherwise persons purchasing stocks after the truth has come out would have a claim for fraud.

II. THIS CASE PRESENTS A GOOD VEHICLE FOR THIS COURT TO ADDRESS THE LEGAL PRESUMPTIONS DRAWN FROM THE EFFICIENT CAPITAL MARKETS HYPOTHESIS

This is at least the second Petition on an aspect of loss causation to reach the Court just this Term, and one in a series of such Petitions in recent years.[6] The Court has already asked the Solicitor General to weigh in on the petition in *Erica P. John Fund, Inc. v. Halliburton Co.*, which seeks review of the Fifth Circuit's standard for loss causation at the class

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[6] *See, e.g., Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403; *Gilead Scis., Inc. v. Trent St. Clare*, No. 08-1021; *Laborers Dist. Council Constr. Ind. Pension Fund v. Omnicare*, No. 09-1400; *Holmes v. Grubman*, No. 10-409; *Thane Int'l, Inc. v. Milkowski*, No. 07-1577.

certification stage, and the Solicitor General has responded by urging the Court to grant that Petition. Brief for the United States as Amicus Curiae, No. 09-1403 (U.S. Dec. 3, 2010).

Amici express no view on the *Halliburton* petition, but agree that the Court should take this opportunity to resolve the confusion among the Circuits regarding the substantive standards for applying the efficient capital markets hypothesis to fraud-on-the-market lawsuits, and submit that this case is a superior vehicle for doing so. Accordingly, whether or not this Court takes the *Halliburton* Petition, it should grant this Petition, and if appropriate consolidate it with *Halliburton*.[7]

The instant Petition presents two advantages over *Halliburton*. First, *Halliburton* presents the threshold issue – a significant question in itself – of the proper procedural standard to apply at the class certification stage, an issue related to the one the Court has already agreed to hear in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277. If the Court determines that the Fifth Circuit applied the wrong standard under Rule 23, it might not reach the question of the substantive methods of proving loss causation, and indeed the Solicitor General has not even asked the Court to address that question. Here, by contrast, the case comes to the Court on a full trial record, and

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[7] In the October 2010 term, the Court consolidated the following cases in order to resolve a shared issue: *Ariz. Christian Sch. Tuition Org., v. Winn*, Docket No. 09-987 and *Garriott v. Winn*, Docket No. 09-991; *Ariz. Free Enter. v. Bennett*, Docket No. 10-238 and *McComish v. Bennett*, Docket No. 10-239; *Boeing Co. v. United States*, Docket No. 09-1302 and *Gen. Dynamics Corp. v. United States*, Docket No. 09-1298; and *Camreta v. Greene*, Docket No. 09-1454 and *Alford v. Greene*, Docket No. 09-1478.

the sole question presented is what constitutes a corrective disclosure in the context of a § 10(b) claim brought under the fraud-on-the- market theory.

Second, this case presents comparatively simple facts. The trial record involves no factual ambiguities regarding what the market was told, and when. The jury was instructed that it could base liability only on a single day's corrective disclosures: the two September 20, 2004 Flynn reports, which the plaintiff contended revealed a single alleged fraud.[8] Supplemental Excerpts of Record at 118, *In re Apollo Group Sec. Litig.*, No. 08-16971 (9th Cir. June 23, 2010). By contrast, *Halliburton* involves ten corrective disclosures covering three separate subjects, none of which presents the question of whether a disclosure is corrective if it repackages facts that had been previously disclosed to no reaction. Thus, this case is a much more straightforward vehicle for addressing the recurring questions of law surrounding application of the efficient capital markets hypothesis.

Alternatively, taking this case in tandem with *Halliburton* would enable this Court to resolve the Circuit splits regarding the law of loss causation at the various stages of a case's life cycle in a comprehensive manner, and to avoid having to revisit the issue repeatedly in the years to come.

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[8] The availability of damages for four additional trading days – permitted by the Ninth Circuit here – is likewise a straightforward question of law tied to the same narrow set of facts.

III. THE NINTH CIRCUIT'S APPROACH DISREGARDS THIS COURT'S CONSISTENT DIRECTIVE TO AVOID NEW NON-STATUTORY EXPANSIONS OF THE IMPLIED PRIVATE RIGHT OF ACTION UNDER § 10(b)

As set forth above, the Ninth Circuit's approach to loss causation amounts to a judicial expansion of the implied § 10(b) cause of action, enabling plaintiffs to selectively use the efficient capital markets hypothesis to sustain a legal presumption of reliance while disregarding precisely the same theory for purposes of proving loss causation and materiality. This Court's precedents have consistently rejected such expansions. This Court should take this opportunity to rein in unreasonable extensions of the efficient capital markets hypothesis as an evidentiary presumption.

The § 10(b) cause of action was a judicial creation, and while its existence has been effectively ratified by Congress, this Court has repeatedly held that Congress, not the courts, must take the lead if § 10(b) is to be extended beyond its present boundaries. See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 522 U.S. 148, 165 (2008) ("The decision to extend the cause of action is for Congress, not for us."); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994). This is consistent with this Court's general approach to implied causes of action. See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2001) (explaining that this Court has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one") (internal quotation marks omitted).

This Court's hesitance to expand the implied right of action without Congressional direction to do so has long been informed by "[t]he practical consequences" of interpreting the statute expansively. *Stoneridge*, 522 U.S. at 158-65. Judicial improvisation creates uncertainty in "an area that demands certainty and predictability." *Cent. Bank*, 511 U.S. at 188 (internal quotation marks omitted); see also *Pinter v. Dahl*, 486 U.S. 622, 652–54 & n. 29 (1988). For the same reasons, this Court has likewise rejected tests that are "complex in formulation and unpredictable in application." *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010). As the Court noted in *Central Bank*, the lack of clear and predictable liability rules "leads to the undesirable result of decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services to participants in the securities business." 511 U.S. at 188. "[S]uch a shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of Rule 10b-5 is not a satisfactory basis for a rule of liability imposed on the conduct of business transactions." *Id.* (internal quotation marks omitted). Here, the more predictable and administrable rule is one that subjects the reliance, materiality and loss causation inquiries to the same empirical standards for showing that an efficient market has reacted in a statistically significant way to new information.

Moreover, judicial expansion of statutes for which there is an implied cause of action, such as § 10(b), upsets the careful balance the securities laws strike between compensating fraud victims and protecting capital markets from the damaging effects of frivolous litigation. The securities laws – and specifically the rules governing market efficiency and

loss causation – were not intended "to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *Dura*, 544 U.S. at 345 (citing *Basic*, 485 U.S. at 252 (White, J., concurring in part and dissenting in part)). Congress has not been silent in striking this balance, but has actively and repeatedly legislated in this area, as illustrated by the fact that the securities laws were amended in 1995, 1996, 1998, 2000, 2002, and 2010. The loss causation provisions applicable to § 10(b) claims were enacted in 1995, in the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995), as part of an "effort to deter or at least quickly dispose of those suits whose nuisance value outweighs their merits." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 82 (2006). Congress drafted those provisions against the backdrop of the efficient-market presumption in *Basic*; if it had wanted to provide a more expansive method of proving damages, it could have done so. Indeed, in §§ 11 and 12 claims under the 1933 Act, which do not rest on the fraud-on-the-market theory, Congress maintained the statutory damages formulas and placed the burden of disproving loss causation on the defendants – but not in § 10(b) cases.

In sum, the Ninth Circuit's rule leaves the determination of recoverable losses under § 10(b) uncertain from case to case and Circuit to Circuit, and untethered from the efficient capital markets hypothesis that gives the claim life in the first instance. This Court should grant the petition to resolve these uncertainties.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APOLLO GROUP, INC. ET AL.,

Petitioners,

v.

POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Manufacturers (the "NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. In support of this mission, the NAM regularly files briefs *amicus curiae* when a case presents a legal issue that will impact the competitiveness of U.S. industry. This is such a case.

Many members of the NAM are publicly traded companies. The competitiveness of these American companies in the global marketplace is adversely affected by the costs associated with securities class action litigation claims, with which foreign companies are largely unburdened. The principles underlying the Ninth Circuit's holding below unnecessarily increase these costs through an asymmetrical

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[1] This *amicus* brief is filed with all parties' consent. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members and its counsel made a monetary contribution to the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

application of the efficient market theory. Indeed, the court embraced the efficient market theory in order to certify a class, but effectively rejected it on the issue of loss causation. Assessing loss causation with reference to events that occur long after corrective public disclosure of the relevant facts in a theoretically efficient market improperly expands the potential exposure of defendants in securities class action cases and decreases the certainty with which companies and insurers can assess this exposure. The effect is negative for the U.S. economy as a whole.

ARGUMENT

I. For Class Certification Purposes, Plaintiffs Get The Benefit Of A Presumption Of Reliance Based On The Efficient Market Theory

The ability of a plaintiff to bring securities fraud claims on a class action basis is grounded in the presumption of reliance under the fraud on the market theory, without which each plaintiff would have to prove actual reliance on the allegedly false and misleading statement – a result that would preclude class certification because individual issues of reliance would predominate over common issues. *Basic, Inc. v. Levinson*, 485 U.S. 224, 250 (1988).

The presumption of reliance is based on the efficient market theory, which holds that in an efficient securities market, all information available

to the market is always rapidly reflected in the price at which securities trade in the market. As the Court stated in *Basic*:

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.

Id. at 241-42 (citation omitted). Thus, the fact that an investor was not aware of a particular statement is irrelevant because the stock price, of which the investor was aware, already incorporates the statement. If a market were not efficient, there would be no presumption of reliance through the fraud on the market theory, requiring individualized inquiry of reliance.

The efficient market theory on which the *Basic* Court relied is itself based on the premise that competition among investors and traders forces stock prices to rapidly reflect all publicly available information. *See, e.g.*, Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 569-72 (1984); Note, *The Fraud-on-the-Market Theory*, 95 HARV. L. REV. 1143, 1154-56 (1982); Note, *Fraud on the Market: An Emerging Theory of Recovery Under SEC Rule 10b-5*, 50 GEO. WASH. L. REV. 627, 647-49 (1982). Since *Basic*,

virtually all academic commentators on market efficiency agree that in an efficient market, the price of a security reflects new facts rapidly – within (depending on the facts) seconds, minutes or *at most* one trading day. *See, e.g.*, Richard A. Brealey, Stewart C. Myers & Franklin Allen, PRINCIPLES OF CORPORATE FINANCE (8th ed. 2006) (information is impounded in stock price within 5-10 minutes); Jeffrey A. Busse & T. Clifton Green, *Market Efficiency in Real Time*, 65 J. FIN. ECON. 415 (2002) (gathering studies and concluding that markets react quickly to information); James M. Patel & Mark A. Wolfson, *The Intraday Speed of Adjustment of Stock Prices to Earnings and Dividend Announcements*, 13 J. FIN. ECON. 223, 250 (1984) (stock market assimilates information "very quickly," starting to react within minutes).

By beginning class certification periods immediately after the allegedly false and misleading statement is made, courts following *Basic* routinely embrace the concept that efficient markets act quickly in assimilating new facts into the price of securities for purposes of applying the presumption of reliance.

II. Defendants Should Get The Benefit Of The Efficient Market Theory For Purposes Of Loss Causation After Corrective Disclosure

If the U.S. securities markets, such as the New York Stock Exchange and NASDAQ Stock Market, are presumed for purposes of class certification and

reliance to be efficient in their ability to rapidly assimilate any false and misleading statements made by a company into the price of securities, they should likewise be presumed for purposes of assessing loss causation to be efficient in their ability to rapidly assimilate any corrective statements made by that company into the price of securities. Indeed, because the market does not know at the outset whether a statement is true or false, this assertion should be self-evident.

There is no rational basis for applying different standards of market efficiency for false statements and true statements. If plaintiffs get the benefit of a reliance presumption based on the efficient market theory, defendants should get the benefit of the same market efficiency reacting to all available corrective disclosures. As the Third Circuit has explained, "An efficient market for good news is an efficient market for bad news." *In re Merck & Co., Inc. Sec. Litig.*, 432 F.3d 261, 271 (3d Cir. 2005).

III. The Uncertain And Inconsistent Application Of The Efficient Market Theory Is Detrimental To The U.S. Economy

Due to the split in the circuit courts on the issue, U.S. manufacturers whose shares trade on efficient markets run the risk of being whipsawed. On the front end, courts assume that their stock price immediately reflects all available information (and thus investors can be presumed to have relied on that

information), while, at least in some jurisdictions, courts do not permit manufacturers to rely on the same presumption to establish that the immediate market reaction to an appropriate corrective disclosure effectively caps their damages. For example, in reversing the district court's judgment as a matter of law, the Ninth Circuit in the instant matter decided that third-party analyst reports may have further deflated Apollo Group's stock price because they were "more authoritative" with respect to "fraud-related information" than the newspaper articles that already had revealed the information five days earlier. Appendix to the Petition at 2a. In contrast, the Third Circuit "has one of the 'clearest commitments' to the efficient market hypothesis," and has decided that a stock price absorbs public information "immediately following disclosure." *In re Merck*, 432 F.3d at 269 (citation omitted). The continued lack of certainty and predictability generated by some courts' one-sided application of the efficient market theory has a significant and negative effect on the U.S. economy.

Uncertainty in the securities litigation arena is expensive for defendants, especially given the heavy costs of defending securities fraud claims. The expense (i) allows plaintiffs to coerce unwarranted or inappropriately large settlements, and (ii) results in American companies paying higher insurance premiums. In addition, the unpredictability in the methodology employed to calculate damages significantly increases American manufacturers' potential exposure in securities cases. The increased

litigation costs, and the potentially higher damages awards, undercut the competitiveness of American companies *vis-à-vis* foreign companies that do not face such expansive potential liability. These increased costs in turn result in higher prices for American consumers, to the detriment of the U.S. economy as a whole.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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